MISSISSIPPI CODE 1972
Annotated

Regulation of Trade, Commerce
and Investments

UNIFORM COMMERCIAL CODE

(§ 75-2A-101 to
§ 75-8-511)

Title 75

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME SIXTEEN A

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

(Uniform Commercial Code)

§§ 75-2A-101 to 75-8-511

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2016 REGULAR AND
1ST AND 2ND EXTRAORDINARY LEGISLATIVE SESSIONS

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2016 Replacement Volume 16A of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume, the 1981 and 2002 Replacement Volume 16 (Title 75, Chapters 2A and 3) and the 1981 and 2002 Replacement Volume 16A (Title 75, Chapters 4 through 8), as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2016 Regular and 1st and 2nd Extraordinary Legislative Sessions.

This volume contains the text of Chapters 2A through 8 of Title 75 of the Mississippi Code of 1972 Annotated, as amended through the 2016 Regular and 1st and 2nd Extraordinary Legislative Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and with decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

PUBLISHER'S FOREWORD

A comprehensive Index appears at the end of this volume.

Visit the LexisNexis website at http://www.lexisnexis.com for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E. Water St., Charlottesville, VA 22902-5386.

September 2016 LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Code Service
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— Attorney General Opinions
— Code Status
— Comparable Legislation from other States
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— Editor's Notes
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

Amendment notes are available online from 1991 until the present in the Mississippi Legislative Archive.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading “Attorney General Opinions.” The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the

Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
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- Allocation of Acts of Legislature, 1931 — 1972.
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- Consolidated Tables of amendments and repeals of 1942 Code sections.
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This chapter shall be known and may be cited as the Uniform Commercial Code—Leases.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

Editor's Note — Laws of 1994, ch. 445, § 6, provides as follows:

"SECTION 6. All laws and parts of laws in conflict with the provisions of this chapter are repealed to the extent of any conflict."

Comparable Laws from other States — Alabama: Code of Ala. § 7-2A-101 et seq.
Alaska: Alaska Stat. § 45.12.101 et seq.
Arizona: A.R.S. § 47-2A101 et seq.
Arkansas: A.C.A. § 4-2A-101 et seq.
California: Cal U Com Code § 10101 et seq.
Colorado: C.R.S. 4-2.5-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-2A-101 et seq.
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District of Columbia: D.C. Code § 28:2A-101 et seq.
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Idaho: Idaho Code § 28-12-101 et seq.
Illinois: 810 ILCS 5/2A-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-2.1-101 et seq.
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Nevada: Nev. Rev. Stat. Ann. § 104A.2101 et seq.
New Hampshire: RSA 382-A:2A-101 et seq.
New Jersey: N.J. Stat. § 12A:2A-101 et seq.
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North Carolina: N.C. Gen. Stat. § 25-2A-101 et seq.
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Ohio: ORC Ann. 1310.01 et seq.
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South Carolina: S.C. Code Ann. § 36-2A-101 et seq.
South Dakota: S.D. Codified Laws § 57A-2A-101 et seq.

Tennessee: Tenn. Code Ann. § 47-2A-101 et seq.
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Vermont: 9A V.S.A. § 2A-101 et seq.
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Virginia: Va. Code Ann. § 8.2A-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.2A-101 et seq.
West Virginia: W. Va. Code § 46-2A-101 et seq.
Wisconsin: Wis. Stat. § 411.101 et seq.
Wyoming: Wyo. Stat. § 34.1-2.A-101 et seq.

§ 75-2A-102. Scope.

This chapter applies to any transaction, regardless of form, that creates a lease.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 269 et seq.

§ 75-2A-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed Twenty-five Thousand Dollars ($25,000.00).

(f) "Fault" means wrongful act, omission, breach or default.

(g) "Finance lease" means a lease with respect to which:

(i) The lessor does not select, manufacture, or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) One (1) of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 75-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(*l*) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this chapter and the sections in which they appear are:

"Accessions"	Section 75-2A-310(1)
"Construction mortgage"	Section 75-2A-309(1)(d)
"Encumbrance"	Section 75-2A-309(1)(e)
"Fixtures"	Section 75-2A-309(1)(a)
"Fixture filing"	Section 75-2A-309(1)(b)
"Purchase money lease"	Section 75-2A-309(1)(c)

(3) The following definitions in other chapters apply to this chapter:

"Account"	Section 75-9-102(a) (2)
"Between merchants"	Section 75-2-104(3)
"Buyer"	Section 75-2-103(1)(a)
"Chattel paper"	Section 75-9-102(a)(11)
"Consumer goods"	Section 75-9-102(a)(23)
"Document"	Section 75-9-102(a)(30)
"Entrusting"	Section 75-2-403(3)
"General intangible"	Section 75-9-102(a)(42)
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"Merchant"	Section 75-2-104(1)
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"Receipt"	Section 75-2-103(1)(c)
"Sale"	Section 75-2-106(1)
"Sale on approval"	Section 75-2-326
"Sale or return"	Section 75-2-326
"Seller"	Section 75-2-103(1)(d)

(4) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 11; Laws, 2006, ch. 527, § 53; Laws, 2010, ch. 506, § 7; Laws, 2013, ch. 451, § 29, eff from and after July 1, 2013.

Cross References — General UCC definitions, see § 75-1-201.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 269 et seq.

§ 75-2A-104. Leases subject to other law.

(1) A lease, although subject to this chapter, is also subject to any applicable:

(a) Certificate of title statute of this state, including, but not limited to, those pertaining to motor vehicles in Chapter 21, Title 63, Mississippi Code of 1972;

(b) Certificate of title statute of another jurisdiction (Section 75-2A-105); or

(c) Consumer protection statute of this state, or final consumer protection decision of a court of this state existing on the effective date of this chapter.

(2) In case of conflict between this chapter, other than Sections 75-2A-105, 75-2A-304(3) and 75-2A-305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 269 et seq.

§ 75-2A-105. Territorial application of chapter to goods covered by certificate of title.

Subject to the provisions of Section 75-2A-304(3) and 75-2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four (4) months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 269 et seq.

§ 75-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty (30) days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 289.

§ 75-2A-107. Waiver or renunciation of claim or right after default.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 308 et seq.

§ 75-2A-108. Unconscionability.

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Parol evidence to show that lease of personalty, absolute on its face, is conditional sale. 57 A.L.R.2d 1076.

Warranties in connection with leasing or hiring of chattels. 68 A.L.R.2d 850.

"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto. 18 A.L.R.3d 1305.

Bailee's duty to insure bailed property. 28 A.L.R.3d 513.

Application of warranty provisions of Uniform Commercial Code to bailments. 48 A.L.R.3d 668.

Time for revocation of acceptance of goods under UCC § 2-608(2). 65 A.L.R.3d 354.

Who bears risk of loss of goods under UCC § 2-509, 2-510. 66 A.L.R.3d 145.

What constitutes "property" obtained within extortion statute. 67 A.L.R.3d 1021.

Construction and effect of UCC § 2-316(2) providing that implied warranty disclaimer must be "conspicuous." 73 A.L.R.3d 248.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1). 73 A.L.R.3d 338.

Danger to reputation as within penal extortion statute requiring threat of "injury to the person." 74 A.L.R.3d 1255.

Bailee's liability as affected by bailment condition that bailor procure insurance. 83 A.L.R.3d 519.

Who is "buyer in ordinary course of business" under Uniform Commercial Code. 87 A.L.R.3d 11.

Who is "merchant" under UCC § 2-314(1) dealing with implied warranties of merchantability. 91 A.L.R.3d 876.

What constitutes "goods" within the scope of UCC Article 2. 4 A.L.R.4th 912.

Construction and effect of UCC § 2-613 governing casualty to goods identified to a contract, without fault of buyer or seller. 51 A.L.R.4th 537.

What constitutes "good faith" under UCC § 1-208 dealing with "insecure" or "at will" acceleration clauses. 85 A.L.R.4th 284.

Validity and construction of state and municipal enactments regulating lobbying. 35 A.L.R.6th 1.

§ 75-2A-109. Option to accelerate at will.

(1) A term providing that one (1) party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

Part 2.

Formation and Construction of Lease Contract.

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75-2A-201. Statute of frauds.
75-2A-202. Final written expression: parol or extrinsic evidence.
75-2A-203. Seals inoperative.
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§ 75-2A-201. Statute of frauds.

(1) A lease contract is not enforceable by way of action or defense unless:

(a) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than One Thousand Dollars ($1,000.00); or

(b) There is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1), but which is valid in other respects, is enforceable:

(a) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) If there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court a lease term, the term so admitted; or

(c) A reasonable lease term.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Sufficiency of description of terms and conditions of lease, or lease provision, so as to comply with statute of frauds. 12 A.L.R.6th 123.

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-202. Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing or usage of trade or by course of performance; and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-203. Seals inoperative.

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-204. Formation in general.

(1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonable certain basis for giving an appropriate remedy.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-205. Firm offers.

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three (3) months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-206. Offer and acceptance in formation of lease contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 288 et seq.

§ 75-2A-207. Repealed.

Repealed by Laws of 2010, ch. 506, § 46, effective from and after July 1, 2010.

§ 75-2A-207. [Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.]

Editor's Note — Former § 75-2A-207 provided for the practical construction of "course of performance" for purposes of the UCC Article 2A-Leases. For present similar provisions, see § 75-1-303, which integrates the course of performance concept from this section and § 75-2-208 into the principles of former § 75-1-205.

§ 75-2A-208. Modification, rescission and waiver.

(1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 292, 311.

§ 75-2A-209. Lessee under finance lease as beneficiary of supply contract.

(1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (Section 75-2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-210. Express warranties.

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-211. Warranties against interference and against infringement; lessee's obligation against infringement.

(1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-212. Implied warranty of merchantability.

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the description in the lease agreement;

(b) In the case of fungible goods, are of fair average quality within the description;

(c) Are fit for the ordinary purposes for which goods of that type are used;

(d) Run, within the variation permitted by the lease agreement, of even kind, quality and quantity within each unit and among all units involved;

(e) Are adequately contained, packaged and labeled as the lease agreement may require; and

(f) Conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-213. Implied warranty of fitness for particular purpose.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-215. Cumulation and conflict of warranties express or implied.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention, the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 291 et seq.

§ 75-2A-216. Third-party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified or limited, but an exclusion, modification or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this section.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

§ 75-2A-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(a) When the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(b) When the goods are shipped, marked or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(c) When the young are conceived, if the lease contract is for a lease of unborn young of animals.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 295 et seq.

§ 75-2A-218. Insurance and proceeds.

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee's insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 296.

§ 75-2A-219. Risk of loss.

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this chapter on the effect of default on risk of loss (Section 75-2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgement by the bailee of the lessee's right to possession of the goods.

(c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 297, 298.

§ 75-2A-220. Effect of default on risk of loss.

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he, to the extent of any deficiency in his effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 315, 331 et seq.

§ 75-2A-221. Casualty to identified goods.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or Section 75-2A-219, then:

(a) If the loss is total, the lease contract is avoided; and

(b) If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 315, 331 et seq.

PART 3.

EFFECT OF LEASE CONTRACT.

SEC.	
75-2A-301.	Enforceability of lease contract.
75-2A-302.	Title to and possession of goods.
75-2A-303.	Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.
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75-2A-308.	Special rights of creditors.
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75-2A-310.	Lessor's and lessee's rights when goods become accessions.
75-2A-311.	Priority subject to subordination.

§ 75-2A-301. Enforceability of lease contract.

Except as otherwise provided in this chapter, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 299.

§ 75-2A-302. Title to and possession of goods.

Except as otherwise provided in this chapter, each provision of this chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 304.

§ 75-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Chapter 9, Secured Transactions, by reason of Section 75-9-109(a)(3).

(2) Except as provided in subsection (3) of Section 75-9-705, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4).

(4) Subject to subsections (3) and Section 75-9-407:

(a) If a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 75-2A-501(2);

(b) If paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of "the lease" or of "all my rights under the lease," or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the

contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 12, eff from and after Jan. 1, 2002.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 303.

§ 75-2A-304. Subsequent lease of goods by lessor.

(1) Subject to Section 75-2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) and Section 75-2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

(a) The lessor's transferor was deceived as to the identity of the lessor;

(b) The delivery was in exchange for a check which is later dishonored;

(c) It was agreed that the transaction was to be a "cash sale"; or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 303-307.

§ 75-2A-305. Sale or sublease of goods by lessee.

(1) Subject to the provisions of Section 75-2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 75-2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

(a) The lessor was deceived as to the identity of the lessee;

(b) The delivery was in exchange for a check which is later dishonored; or

(c) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 307.

§ 75-2A-306. Priority of certain liens arising by operation of law.

If a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 184.

§ 75-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in Section 75-2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3), and in Sections 75-2A-306 and 75-2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in Sections 75-9-317, 75-9-321 and 75-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 13, eff from and after Jan. 1, 2002.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 184, 300.

§ 75-2A-308. Special rights of creditors.

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 300, 301.

§ 75-2A-309. Lessor's and lessee's rights when goods become fixtures.

(1) In this section:

(a) Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) A "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 75-9-502(a) and (b);

(c) A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) A mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this chapter of ordinary building materials incorporated into an improvement on land.

(3) This chapter does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten (10) days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this chapter, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party see king removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Chapter on Secured Transactions (Chapter 9).

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 14, eff from and after Jan. 1, 2002.

§ 75-2A-310. Lessor's and lessee's rights when goods become accessions.

(1) Goods are "accessions" when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4).

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) is subordinate to the interest of

(a) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this chapter, or (b) if necessary to enforce his other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but he must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

§ 75-2A-311. Priority subject to subordination.

Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

PART 4.

PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED.

SEC.
75-2A-401. Insecurity: adequate assurance of performance.
75-2A-402. Anticipatory repudiation.
75-2A-403. Retraction of anticipatory repudiation.
75-2A-404. Substituted performance.
75-2A-405. Excused performance.
75-2A-406. Procedure on excused performance.
75-2A-407. Irrevocable promises: finance leases.

§ 75-2A-401. Insecurity: adequate assurance of performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty (30) days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

§ 75-2A-402. Anticipatory repudiation.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(a) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(b) Make demand pursuant to Section 75-2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) Resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (Section 75-2A-524).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

§ 75-2A-403. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Section 75-2A-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

§ 75-2A-404. Substituted performance.

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means of payment that is commercially a substantial equivalent; and

(b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

§ 75-2A-405. Excused performance.

Subject to Section 75-2A-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. He may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 311.

§ 75-2A-406. Procedure on excused performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 75-2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 75-2A-510):

(a) Terminate the lease contract (Section 75-2A-505(2)); or

(b) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under Section 75-2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty (30) days, the lease contract lapses with respect to any deliveries affected.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

§ 75-2A-407. Irrevocable promises: finance leases.

(1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1):

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 302.

PART 5.

DEFAULT.

Article A.	In General	75-2A-501
Article B.	Default by Lessor	75-2A-508
Article C.	Default by Lessee	75-2A-523

ARTICLE A.

IN GENERAL.

SEC.	
75-2A-501.	Default: procedure.
75-2A-502.	Notice after default.
75-2A-503.	Modification or impairment of rights and remedies.
75-2A-504.	Liquidation of damages.
75-2A-505.	Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.
75-2A-506.	Statute of limitations.
75-2A-507.	Proof of market rent: time and place.

§ 75-2A-501. Default: procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this chapter.

(4) Except as otherwise provided in Section 75-1-305(a) or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 8, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 308.

§ 75-2A-502. Notice after default.

Except as otherwise provided in this chapter or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 308, 310.

§ 75-2A-503. Modification or impairment of rights and remedies.

(1) Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

(2) Resort to a remedy provided under this chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this chapter.

(3) Consequential damages may be liquidated under Section 75-2A-504, or may otherwise be limited, altered or excluded unless the limitation, alteration or exclusion is unconscionable. Limitation, alteration or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration or exclusion of damages where the loss is commercial is not prima facie unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this chapter.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 311.

§ 75-2A-504. Liquidation of damages.

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Section 75-2A-525 or 75-2A-526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1); or

(b) In the absence of those terms, twenty percent (20%) of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or Five Hundred Dollars ($500.00).

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

(a) A right to recover damages under the provisions of this chapter other than subsection (1) of this section; and

(b) The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 312.

§ 75-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of "cancellation," "rescission," or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 313.

§ 75-2A-506. Statute of limitations.

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four (4) years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one (1) year.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this chapter becomes effective.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 214 et seq.

§ 75-2A-507. Proof of market rent: time and place.

(1) Damages based on market rent (Section 75-2A-519 or 75-2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in Sections 75-2A-519 and 75-2A-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for

the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this chapter offered by one (1) party is not admissible unless and until he has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 214 et seq.

ARTICLE B.

DEFAULT BY LESSOR.

SEC.

75-2A-508. Lessee's remedies.
75-2A-509. Lessee's rights on improper delivery; rightful rejection.
75-2A-510. Installment lease contracts: rejection and default.
75-2A-511. Merchant lessee's duties as to rightfully rejected goods.
75-2A-512. Lessee's duties as to rightfully rejected goods.
75-2A-513. Cure by lessor of improper tender or delivery; replacement.
75-2A-514. Waiver of lessee's objections.
75-2A-515. Acceptance of goods.
75-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.
75-2A-517. Revocation of acceptance of goods.
75-2A-518. Cover; substitute goods.
75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.
75-2A-520. Lessee's incidental and consequential damages.
75-2A-521. Lessee's right to specific performance or replevin.
75-2A-522. Lessee's right to goods on lessor's insolvency.

§ 75-2A-508. Lessee's remedies.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (Section 75-2A-509) or repudiates the lease contract (Section 75-2A-402), or a lessee rightfully rejects the goods (Section 75-2A-509) or justifiably revokes acceptance of the goods (Section 75-2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired

(Section 75-2A-510), the lessor is in default under the lease contract and the lessee may:

(a) Cancel the lease contract (Section 75-2A-505(1));

(b) Recover so much of the rent and security as has been paid and is just under the circumstances;

(c) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Sections 75-2A-518 and 75-2A-520), or recover damages for nondelivery (Sections 75-2A-519 and 75-2A-520);

(d) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) If the goods have been identified, recover them (Section 75-2A-522); or

(b) In a proper case, obtain specific performance or replevy the goods (Section 75-2A-521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Section 75-2A-519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Section 75-2A-519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to Section 75-2A-527(5).

(6) Subject to the provisions of Section 75-2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 315, 331.

§ 75-2A-509. Lessee's rights on improper delivery; rightful rejection.

(1) Subject to the provisions of Section 75-2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 319.

§ 75-2A-510. Installment lease contracts: rejection and default.

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 320.

§ 75-2A-511. Merchant lessee's duties as to rightfully rejected goods.

(1) Subject to any security interest of a lessee (Section 75-2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (Section 75-2A-512) disposes of goods, he is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring

for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent (10%) of the gross proceeds.

(3) In complying with this section or Section 75-2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 75-2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this chapter.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 321.

§ 75-2A-512. Lessee's duties as to rightfully rejected goods.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (Section 75-2A-511) and subject to any security interest of a lessee (Section 75-2A-508(5)):

(a) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Section 75-2A-511; but

(c) The lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 321.

§ 75-2A-513. Cure by lessor of improper tender or delivery; replacement.

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the

supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 322.

§ 75-2A-514. Waiver of lessee's objections.

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) If, stated seasonably, the lessor or the supplier could have cured it (Section 75-2A-513); or

(b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2006, ch. 527, § 54, eff from and after July 1, 2006.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 323.

§ 75-2A-515. Acceptance of goods.

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and

(a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) The lessee fails to make an effective rejection of the goods (Section 75-2A-509 (2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 324.

§ 75-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this chapter or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 75-2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) The burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two (2) litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 75-2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 75-2A-211).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 325.

§ 75-2A-517. Revocation of acceptance of goods.

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 327.

§ 75-2A-518. Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in Section 75-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 75-2A-519 governs.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 9, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 328.

§ 75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 75-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any

manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 10, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 329.

§ 75-2A-520. Lessee's incidental and consequential damages.

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

(a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 330.

§ 75-2A-521. Lessee's right to specific performance or replevin.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 331.

§ 75-2A-522. Lessee's right to goods on lessor's insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Section 75-2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten (10) days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 333.

ARTICLE C.

DEFAULT BY LESSEE.

Sec.
75-2A-523. Lessor's remedies.
75-2A-524. Lessor's right to identify goods to lease contract.
75-2A-525. Lessor's right to possession of goods.
75-2A-526. Lessor's stoppage of delivery in transit or otherwise.
75-2A-527. Lessor's rights to dispose of goods.
75-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation or other default.
75-2A-529. Lessor's action for the rent.
75-2A-530. Lessor's incidental damages.
75-2A-531. Standing to sue third parties for injury to goods.
75-2A-532. Lessor's rights to residual interest.

§ 75-2A-523. Lessor's remedies.

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole,

then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 75-2A-510), the lessee is in default under the lease contract and the lessor may:

(a) Cancel the lease contract (Section 75-2A-505(1));

(b) Proceed respecting goods not identified to the lease contract (Section 75-2A-524);

(c) Withhold delivery of the goods and take possession of goods previously delivered (Section 75-2A-525);

(d) Stop delivery of the goods by any bailee (Section 75-2A-526);

(e) Dispose of the goods and recover damages (Section 75-2A-527), or retain the goods and recover damages (Section 75-2A-528), or in a proper case recover rent (Section 75-2A-529);

(f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1), the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsection (1) or (2); or

(b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 331 et seq.

§ 75-2A-524. Lessor's right to identify goods to lease contract.

(1) A lessor aggrieved under Section 75-2A-523(1) may:

(a) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) Dispose of goods (Section 75-2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an

aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 332.

§ 75-2A-525. Lessor's right to possession of goods.

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Section 75-2A-527).

(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 333.

§ 75-2A-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

(a) Receipt of the goods by the lessee;

(b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee hold the goods for the lessee; or

(c) Such an acknowledgement to the lessee by a carrier via reshipment or as a warehouse.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2006, ch. 527, § 55, eff from and after July 1, 2006.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 334.

§ 75-2A-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Section 75-2A-525 or 75-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 75-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this chapter.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 75-2A-508(5)).

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 11, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 335.

§ 75-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-302 and 75-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Section 75-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2010, ch. 506, § 12, eff from and after July 1, 2010.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 336.

§ 75-2A-529. Lessor's action for the rent.

(1) After default by the lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 75-2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3), the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by Section 75-2A-527 or Section 75-2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 75-2A-527 or 75-2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section 75-2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Sections 75-2A-527 and 75-2A-528.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 337.

§ 75-2A-530. Lessor's incidental damages.

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 338.

§ 75-2A-531. Standing to sue third parties for injury to goods.

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

(i) Has a security interest in the goods;

(ii) Has an insurable interest in the goods; or

(iii) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 314.

§ 75-2A-532. Lessor's rights to residual interest.

In addition to any other recovery permitted by this chapter or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 339.

CHAPTER 3

Uniform Commercial Code — Negotiable Instruments

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Part 7. Advice of International Sight Draft [Repealed]
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Editor's Note — Chapter 3 of the UCC was substantially rewritten by laws 1992, ch. 420, effective January 1, 1993. The following table shows where provisions of the former UCC Chapter 3 now appear in the new UCC Chapter 3:

Former UCC Chapter 3	New Chapter 3
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Former UCC Chapter 3	New Chapter 3
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75-3-410	75-3-409
75-3-411	75-3-409 and 75-3-411
75-3-412	75-3-410
75-3-413	Various sections
75-3-414	75-3-415
75-3-415	75-3-419
75-3-416	75-3-117
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75-3-418	75-3-418
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75-3-509	75-3-505
75-3-510	75-3-505
75-3-511	75-3-504
75-3-601	75-3-601
75-3-602	75-3-602
75-3-603	75-3-603
75-3-604	75-3-603
75-3-605	75-3-604
75-3-606	75-3-605
75-3-701	Repealed
75-3-801	Repealed
75-3-802	75-3-310
75-3-803	Repealed
75-3-804	75-3-309
75-3-805	75-3-109

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

SEC.	
75-3-101.	Short title.
75-3-102.	Subject matter.

75-3-103. Definitions.
75-3-104. Negotiable instrument.
75-3-105. Issue of instrument.
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75-3-108. Payable on demand or at definite time.
75-3-109. Payable to bearer or to order.
75-3-110. Identification of person to whom instrument is payable.
75-3-111. Place of payment.
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75-3-113. Date of instrument.
75-3-114. Contradictory terms of instrument.
75-3-115. Incomplete instrument.
75-3-116. Joint and several liability; contribution.
75-3-117. Other agreements affecting instrument.
75-3-118. Statute of limitations.
75-3-119. Notice of right to defend action.
75-3-120 through 75-3-122. Repealed.

§ 75-3-101. Short title.

This chapter may be cited as Uniform Commercial Code — Negotiable Instruments.

SOURCES: Former § 75-3-101: Codes, 1942, § 41A:3-101; Laws, 1966, ch. 316, § 3-101; Laws, 1992 ch. 420, § 1, eff from and after January 1, 1993.

Comparable Laws from other States — Alabama: Code of Ala. § 7-3-101 et seq.
Alaska: Alaska Stat. § 45.03.101 et seq.
Arizona: A.R.S. § 47-3101 et seq.
Arkansas: A.C.A. § 4-3-101 et seq.
California: Cal U Com Code § 3101 et seq.
Colorado: C.R.S. 4-3-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-3-101 et seq.
Delaware: 6 Del. C. § 3-101 et seq.
District of Columbia: D.C. Code § 28:3-101 et seq.
Florida: Fla. Stat. § 673.1011 et seq.
Georgia: O.C.G.A. § 11-3-101 et seq.
Hawaii: HRS § 490:3-101 et seq.
Idaho: Idaho Code § 28-3-101 et seq.
Illinois: 810 ILCS 5/3-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-3.1-101 et seq.
Iowa: Iowa Code § 554.3101 et seq.
Kansas: K.S.A. § 84-3-101 et seq.
Kentucky: KRS § 355.3-101 et seq.
Louisiana: La. R.S. § 10:3-101 et seq.
Maine: 11 M.R.S. § 3-1101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 3-101 et seq.
Massachusetts: ALM GL ch. 106, § 3-101 et seq.
Michigan: MCLS § 440.3101 et seq.
Minnesota: Minn. Stat. § 336.3-101 et seq.
Missouri: § 400.3-101 R.S.Mo. et seq.
Montana: 30-3-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 3-101 et seq.

Nevada: Nev. Rev. Stat. Ann. § 104.3101 et seq.
New Hampshire: RSA 382-A:3-101 et seq.
New Jersey: N.J. Stat. § 12A:3-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-3-101 et seq.
New York: NY CLS UCC § 3-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-3-101 et seq.
North Dakota: N.D. Cent. Code, § 41-03-01 et seq.
Ohio: ORC Ann. 1303.01 et seq.
Oklahoma: 12A Okl. St. § 3-101 et seq.
Oregon: ORS § 73.0101 et seq.
Pennsylvania: 13 Pa.C.S. § 3101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-3-101 et seq.
South Carolina: S.C. Code Ann. § 36-3-101 et seq.
South Dakota: S.D. Codified Laws § 57A-3-101 et seq.
Tennessee: Tenn. Code Ann. § 47-3-101 et seq.
Texas: Tex. Bus. & Com. Code § 3.101 et seq.
Utah: Utah Code Ann. § 70A-3-101 et seq.
Vermont: 9A V.S.A. § 3-101 et seq.
Virgin Islands: 11A V.I.C. § 3-101 et seq.
Virginia: Va. Code Ann. § 8.3A-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.3-101 et seq.
West Virginia: W. Va. Code § 46-3-101 et seq.
Wisconsin: Wis. Stat. § 403.101 et seq.
Wyoming: Wyo. Stat. § 34.1-3-101 et seq.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-101.

11. In general.
12. Installment contracts.
13. Holders in due course.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-101.

11. In general.

Where a trust deed made specific reference to the indebtedness as evidenced by defendant's note, of even date, the deed falls within the provisions of the Article relating to commercial paper, rather than Article 8 dealing with investment securities. Rago v. Cosmopolitan Nat'l Bank, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

Negotiable instruments are now governed by Article 3 of the UCC. First Trust & Sav. Bank v. Fidelity-Philadelphia Trust Co., 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954).

12. Installment contracts.

Under provisions of consumer credit act prohibiting use of negotiable instruments in consumer credit transactions, instrument entitled "Retail Installment Agreement (Security Interest)," although it contained necessary elements of negotiable instrument set out in UCC § 3-104, was not negotiable instrument, but was retail installment contract and security agreement subject to provisions of Article 9 of UCC, where instrument was drawn by creditor regulated by consumer credit act and contained matters required by consumer credit act, and where bulk of its terms provided for retention of title and preservation of purchase money security interest as prescribed by Article 9. Jefferson v. Mitchell Select Furn. Co., 56 Ala. App. 259, 321 So. 2d 216 (Civ. App. 1975).

13. Holders in due course.

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. Chicago Title & Trust Co. v. Walsh, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

RESEARCH REFERENCES

Law Reviews. Lawrence, Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions. 62 N.C. L. Rev. 115, October, 1983.

§ 75-3-102. Subject matter.

(a) This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by Chapter 4A, or to securities governed by Chapter 8.

(b) If there is conflict between this chapter and Chapter 4 or 9, Chapters 4 and 9 govern.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

SOURCES: Former § 75-3-102: Codes, 1942, § 41A:3-102; Laws, 1966, ch. 316, § 3-102; Laws, 1992, ch. 420, § 2, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. Applicability.
2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-103.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1. Applicability.

Because four CDs were non-negotiable, they were not instruments governed by Article 3 of Mississippi's Uniform Commercial Code, Miss. Code Ann. § 75-3-101 et seq. Ravenstein v. Cmty. Trust Bank, 141 So. 3d 396 (Miss. Ct. App. 2013).

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

The present version of Article 3 does not apply to a non-negotiable instrument. Addington v. Estate of Temple (In re Estate of Temple), — So. 2d —, 2000 Miss. App. LEXIS 138 (Miss. Ct. App. Mar. 28, 2000), reversed by 780 So. 2d 639, 2001 Miss. LEXIS 69 (Miss. 2001).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-103.

11. In general.

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained $20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. Victory Nat'l Bank v. Oklahoma State Bank, 520 P.2d 675 (Okla. 1973).

Because provisions of Article 4 govern inconsistent provisions of Article 3 to the extent that corresponding provisions cannot be reconciled, bank taking check for deposit by customer without indorsement by customer succeeds to rights of customer as "holder". To same effect, see affirming opinion of Circuit Court of Appeals in 425 F2d 81. Bowling Green, Inc. v. State St. Bank & Trust Co., 307 F. Supp. 648 (D. Mass. 1969), aff'd, 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999).

Article 3 does not, by virtue of subsection (1) of the instant section apply to "money" as defined by § 1-201(24), and hence it does not apply to Federal Reserve notes which constitute "money" within the Code definition. Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968).

§ 75-3-103. Definitions.

(a) In this chapter:

(1) "Acceptor" means a drawee who has accepted a draft.

(2) [Reserved]

(3) [Reserved]

(4) "Drawee" means a person ordered in a draft to make payment.

(5) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(6) [Reserved]

(7) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(8) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(9) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to

examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4.

(10) "Party" means a party to an instrument.

(11) "Principal obligor," with respect to an instrument, means the accommodated party or any other party to the instrument against whom a secondary obligor has recourse under this article.

(12) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(13) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(b)(8), Mississippi Code of 1972).

(14) [Reserved]

(15) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(16) "Remotely created check" means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn.

(17) "Secondary obligor," with respect to an instrument, means (i) an indorser or an accommodation party, (ii) a drawer having the obligation described in Section 75-3-414(d), or (iii) any other party to the instrument that has recourse against another party to the instrument pursuant to Section 75-3-116(b).

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Acceptance"	Section 75-3-409
"Accommodated party"	Section 75-3-419
"Accommodation party"	Section 75-3-419
"Account"	Section 75-4-104
"Alteration"	Section 75-3-407
"Anomalous indorsement"	Section 75-3-205
"Blank indorsement"	Section 75-3-205
"Cashier's check"	Section 75-3-104
"Certificate of deposit"	Section 75-3-104
"Certified check"	Section 75-3-409
"Check"	Section 75-3-104
"Consideration"	Section 75-3-303
"Draft"	Section 75-3-104
"Holder in due course"	Section 75-3-302
"Incomplete instrument"	Section 75-3-115
"Indorsement"	Section 75-3-204
"Indorser"	Section 75-3-204
"Instrument"	Section 75-3-104
"Issue"	Section 75-3-105

"Issuer"	Section 75-3-105
"Negotiable instrument"	Section 75-3-104
"Negotiation"	Section 75-3-201
"Note"	Section 75-3-104
"Payable at a definite time"	Section 75-3-108
"Payable on demand"	Section 75-3-108
"Payable to bearer"	Section 75-3-109
"Payable to order"	Section 75-3-109
"Payment"	Section 75-3-602
"Person entitled to enforce"	Section 75-3-301
"Presentment"	Section 75-3-501
"Reacquisition"	Section 75-3-207
"Special indorsement"	Section 75-3-205
"Teller's check"	Section 75-3-104
"Transfer of instrument"	Section 75-3-203
"Traveler's check"	Section 75-3-104
"Value"	Section 75-3-303

(c) The following definitions in other chapters apply to this chapter:

"Banking day"	Section 75-4-104
"Clearinghouse"	Section 75-4-104
"Collecting bank"	Section 75-4-105
"Depositary bank"	Section 75-4-105
"Documentary draft"	Section 75-4-104
"Intermediary bank"	Section 75-4-105
"Item"	Section 75-4-104
"Payor bank"	Section 75-4-105
"Suspends payments"	Section 75-4-104

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Former § 75-3-103: Codes, 1942, § 41A:3-103; Laws, 1966, ch. 316, § 3-103; Laws, 1992, ch. 420, § 3; Laws, 2010, ch. 506, § 13, eff from and after July 1, 2010.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in a statutory reference in subsection (a)(13) by substituting "Section 75-1-201(b)(8)" for "Section 75-1-201(8)" The Joint Committee ratified the correction at its August 5, 2016, meeting.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-102.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-102.

11. In general.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Where contract for sale of cotton provided that risk of loss remained with seller until warehouse receipts "are issued" or "have been issued" and where cotton was burned after delivery to buyer, but one day prior to completion and issuance of warehouse receipts, words in contract relating to "issue", pursuant to definition in UCC § 3-102, meant that warehouse receipts not only must have been complete in form and signed as required by UCC § 7-202, but must have been delivered to seller; thus, seller was entitled to entire proceeds of insurance settlement since loss occurred prior to time warehouse receipts were issued. Livingston v. Hohenberg Bros. Co., 341 So. 2d 104 (Miss. 1976).

Execution of guarantee was not Code transaction; guarantee was not "transaction…which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. EAC Credit Corp. v. King, 507 F.2d 1232 (5th Cir. 1975).

Trial court erred in granting directed verdict upon check in favor of payee where drawers testified that parties orally agreed that check was not to be effective and should not be presented for payment until drawees received insurance money from destruction of hay crops by fire. Parol evidence was admissible to show that check was not to be operative as binding obligation until occurrence of some condition precedent. Although insurance proceeds had been received by time of trial and, therefore, check was payable at that time, judgment in favor of payee could not be sustained since present action was on check, not on underlying debt, proper presentment to bank was conditioned precedent to drawers' liability and there was no evidence of any presentment subsequent to receipt by drawers of proceeds of insurance. Engelcke v. Stoehsler, 273 Or. 937, 544 P.2d 582 (1975).

Although a federal reserve note is money and is therefore commercial paper under Article 3 of the Code, the delivery of such a note to one of the twelve Federal Reserve Banks is the first delivery to a holder or a remitter, the sense in which issue is used in the Code, and is therefore an issuance for the purpose of a criminal statute, where counterfeit notes are involved. Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968).

Contracts guaranteeing the payment of the purchase price by a purchaser are not negotiable instruments, and are therefore not governed by any of the provisions of Article 3. Associates Disct. Corp. v. Elgin Organ Ctr., Inc., 375 F.2d 97 (7th Cir. Ill. 1967).

The instant section was referred to in a case in which the drawer of a check sought to hold in conversion a bank, other than the drawee, which had cashed the check upon a forged indorsement, in connection with the proposition that the provision of § 3-419, that an instrument is converted when paid on a forged indorsement was not applicable to the paying bank which was not a payor bank as defined in § 4-105(b). Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

The word "holder" in the law of Bills and Notes includes the payee or indorsee of a bill or note who is in possession of it; and, accordingly, a bank, while it retained the ownership and possession of notes secured by a deed of trust, was the holder thereof. Federal Land Bank v. Miller, 199 Miss. 615, 25 So. 2d 11 (1946).

Assignee of deed of trust, owning all of unpaid notes secured thereby except two which were in possession of assignor merely for collection, was legal holder of the unpaid notes within purview of provision in the deed authorizing legal holders of a majority of the unpaid indebtedness secured thereby to appoint a substituted trustee upon death of original one. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944).

Ordinarily, a bond, bill or note is not "issued" until delivered to purchaser or otherwise put into circulation. Love v. Mayor & Bd. of Aldermen, 166 Miss. 322, 148 So. 382 (1933).

§ 75-3-104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

SOURCES: Former § 75-3-104: Codes, 1942, § 41A:3-104; Laws, 1966, ch. 316, § 3-104; Laws, 1992, ch. 420, § 4, eff from and after January 1, 1993.

Cross References — Nonnegotiable promissory note, as defined in § 15-1-81, and "note," as defined in this section to have statutes of limitations, see § 15-1-81.

Declaration that state general obligation bonds issued for the support of the Institute for Technology Development are negotiable instruments, see § 31-29-7.

General obligation bonds issued for the purpose of renovating or repairing facilities at various institutions of higher learning, the Education and Research Center, and the Gulf Coast Research Laboratory being negotiable instruments, see § 37-101-311.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. "Promise."
2. Negotiable instrument.
3. Certificate of deposit.
4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-104.

11. In general.
12. Comparison with former law.
13. Draft or bill of exchange.
14. Check.
15. —Conditions or restrictions.
16. —Instruments missing signature, amount or other elements.
17. —Payable to order or bearer.
18. —Other matters.
19. Certificate of deposit.
20. Note.
21. —Additional powers or provisions.
22. —Relationship with contracts or other documents.
23. —Requirement that note be unconditional.
24. —Time for payment.
25. Bonds, warrants and other government obligations.
26. Money order.
27. Retail installment contract.
28. Traveler's check.
29. Withdrawal order.
30. "Draft," "Check" or other terms applied to non-negotiable instruments.
31. Confession of judgment.
32. Miscellaneous instruments.

III. DECISIONS UNDER FORMER STATUTES.

33. Decisions under former Code 1942 § 42.
34. Decisions under former Code 1942 § 51.
35. Decisions under former Code 1942 § 167.
36. Decisions under former Code 1942 § 225.
37. Decisions under former Code 1942 § 226.

I. DECISIONS UNDER CURRENT LAW.

1. "Promise."

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

2. Negotiable instrument.

Promissory notes were not negotiable instruments and, thus, not subject to a six-year statute of limitations, where they did not contain the language "payable to the order of" or were not made payable to an identified payee or order. Whitaker v. Limeco Corp., 32 So. 3d 429 (Miss. 2010).

Recap statements prepared by lender did not satisfy the definition of a negotiable instrument because first, there was no written document that contained an unconditional promise by the borrowers to pay him; second, with the exception of the checks written by the lender to either one of the borrower's or her husband's furniture company, none of the documents that the lender alleged to comprise a written demand note contained the words "payable to bearer" or "payable to order." Lacking these things, the lender's claims were not claims upon negotiable instruments so as to be governed by the Uniform Commercial Code and covered under the six-year statute of limitations pursuant to Miss. Code Ann. § 75-3-118(b). Morgan v. Stevens, 989 So. 2d 482 (Miss. Ct. App. 2008).

3. Certificate of deposit.

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-104.

11. In general.

Provisions of UCC §§ 3-104 and 3-109 as to form of instruments and definite time for payment could in no way alter meaning of "definite" and "indefinite" as used in Internal Revenue Code for purpose of valuation of notes in determining tax liability. Caruth v. United States, 566 F.2d 901 (5th Cir. Tex. 1978).

Whether particular instrument is negotiable within meaning of UCC Art 3 can be determined only by reading UCC §§ 3-104 through 3-112 as a unit. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

In order to be a negotiable instrument under UCC Art 3, instrument must precisely meet definition of "negotiable instrument" contained in UCC § 3-104(1). Moreover, in determining whether an instrument meets such definition, only the instrument itself and not any other documents may be looked to, even though the instrument may refer to other documents that allegedly cure defects in instrument's negotiability. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Execution of guarantee was not Code transaction; guarantee was not "transaction...which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. EAC Credit Corp. v. King, 507 F.2d 1232 (5th Cir. 1975).

Any writing to be a negotiable instrument must be signed by the maker or drawer. Jenkins v. Evans, 31 A.D.2d 597 (3d Dep't 1968).

The negotiability of an instrument is not affected by the presence of a seal. Pitts v. Pitchford, 201 So. 2d 563 (Fla. App. 1967), cert. denied, 207 So. 2d 452 (Fla. 1967).

Where a promissory note authorizes confession of judgment as of any time it is not "an instrument otherwise negotiable," and being non-negotiable its execution under seal imports consideration. Smith v. Lenchner, 204 Pa. Super. 500, 205 A.2d 626 (Super. 1964).

12. Comparison with former law.

Under Code, as formerly, one may bring action upon debt evidenced by commercial paper in form of suing directly on instrument which imports its own consideration without setting forth facts creating obligation evidenced by paper; obligee, however, still has only one cause of action for amount owing him, and filing of action based directly on check will not inhibit him from pleading and proving facts, including consideration for which check was given, and addition of such facts to declaration will not constitute new cause of action. Minner v. Childs, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

The requirement of the NIL of an unconditional order or promise to pay a sum certain of money is continued in the Code. United States v. Farrington, 172 F. Supp. 797 (D. Mass. 1959).

13. Draft or bill of exchange.

"Envelope draft" presented by beneficiary of letter of credit to issuer was not validly drawn in accordance with letter's terms where (1) it did not contain statement, "Drawn Under National Bank of Austin Letter of Credit No. 8274," as required by such letter, and (2) instrument was not a draft under UCC § 3-104(1)(a), since drawer's alleged signature was on back of instrument and not on line in right-hand corner of face of instrument that was provided for drawer's signature (applying Illinois law, and holding that signature on back of instrument was actually indorsement under UCC § 3-402). North Valley Bank v. National Bank, 437 F. Supp. 70 (N.D. Ill. 1977).

Document entitled "collection letter" which made allusion to accompanying draft did not constitute sight draft where it was not unconditional order to pay money and was burdened with additional instructions, and where bank's typed name only signature thereon. Bounty Trading Corp. v. S.E.K. Sportswear, Ltd., 48 A.D.2d 811 (1st Dep't 1975).

Where the defendant unexplainedly came into possession of a stolen and forged check and signed his name as payee and then indorsed it, the check became a bill of exchange, payable upon demand at the drawee bank. People v. White, 55 Misc. 2d 298 (1967).

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand a sum certain to order or to bearer. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

A bill of exchange becomes a check when drawn on a bank payable on demand. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

The negotiability of a trade acceptance which otherwise conforms to the statutory requirements is unaffected by a mere reference on the face of the instrument to the transaction from which it arose. Federal Factors, Inc. v. Wellbanke, 241 Ark. 44, 406 S.W.2d 712 (1966).

14. Check.

Where defendant gave a check to plaintiff to present to a bank for repayment of a loan, the instrument met the definition of a check in Miss. Code Ann. § 75-3-104. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

Where bank customer could withdraw money by inserting card into computer terminal and foundation of relationship between bank and customer was bank's agreement to pay out customer's money according to customer's order, card constituted "check" within meaning of UCC § 3-104, notwithstanding card was non-negotiable. Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co., 536 F.2d 176 (7th Cir. Ill. 1976), cert. denied, 429 U.S. 871, 97 S. Ct. 184, 50 L. Ed. 2d 151 (1976).

The ordinary form of personal check is a negotiable instrument. Middlemas v. Wright, 493 S.W.2d 282 (Tex. Civ. App. 1973).

Under Code provision defining check as draft drawn on bank and payable on demand, negotiable instrument drawn on bank payable to defendants was check. Russ Togs, Inc. v. Gordon, 127 Ga. App. 520, 194 S.E.2d 280 (1972).

Signed letter and telegram satisfied Code § 3-104 (2)(b) requirements for "check", so that bank, required by resolution to transfer funds pursuant to "check", was not negligent in acting pursuant to signed letter and telegram. United Milk Prods. Co. v. Lawndale Nat'l Bank, 392 F.2d 876 (7th Cir. Ill. 1968).

A check is a draft on a bank, payable on demand but revocable until paid or accepted for payment. Mott v. Sewickley Sav. & Loan Ass'n, 211 Pa. Super. 357, 236 A.2d 541 (1967).

That at the time the successful bidder at a public auction issued the city his personal check for the required deposit against his bid there were insufficient funds in his account to pay it did not invalidate the bid when the check was duly paid on presentation to the drawee bank, for the check was not payment at the time of sale but merely a promise of future payment at the time of its presentation. Kensil v. Ocean City, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

A check can be a negotiable instrument without constituting immediate payment, and unless the parties agree otherwise, a check is not payment until presented and paid. Kensil v. Ocean City, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

15. —Conditions or restrictions.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son: (1) Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1) and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

Written instructions on reverse side of checks which were properly dated (i.e., dated as of time of issue), limiting time for deposit to future date, did not preclude instruments from being payable on demand as required by UCC § 3-104(2)(b); instructions on checks could not be regarded as qualified or restrictive endorsements since drawer was not holder of checks and, since instructions were not endorsements, they were not binding on payee or on subsequent holders. Silver Creations, Ltd. v. UPS, 133 N.J. Super. 543, 337 A.2d 641, 88 A.L.R.3d 1093 (L. Div. 1975).

The requirement that a check contained an unconditional promise to pay applies only to the matter of the form of a negotiable instrument, and as between the original parties payment by check is conditional. Mansion Carpets, Inc. v. Marinoff, 24 A.D.2d 947 (1st Dep't 1965).

16. —Instruments missing signature, amount or other elements.

In action by materials supplier against subcontractor to recover entire proceeds of four checks drawn by general contractor and made jointly payable to both supplier and subcontractor, where subcontractor surrendered all four checks to supplier without indorsement and general contractor's bank, at supplier's request, exchanged such checks for two cashier's checks made payable to supplier and subcontractor, (1) bank by exchanging checks originally issued for cashier's checks did not alter rights of parties named in originally issued checks; (2) drawer of original checks (general contractor) was not placed at disadvantage because drawer's account was immediately chargeable on presentation and acceptance of original checks; (3) payees of original checks (supplier and subcontractor) were also not placed at disadvantage because funds in same amount were available to them from the cashier's checks; (4) validity of drawer's order to bank to make payment to payees named in original checks was not in question; and (5) making of cashier's checks payable to payees named therein (supplier and subcontractor) did not circumvent purpose of requirement of indorsements, since indorsements would still be routinely required under UCC § 3-104(2)(b) and UCC §§ 3-201 et seq. to negotiate the cashier's checks. In such case, bank was not negligent in performing customer's orders under rule that bank will be protected if it pays without indorsement as long as payee actually receives money ordered by drawer to be paid. Swan Air Conditioning Co. v. Crest

Constr. Corp., 568 P.2d 1330 (Okla. Ct. App. 1977).

Where drawee bank paid checks imprinted with false unauthorized signature stamps, drawer was entitled to recover on bond covering forgery and alteration, despite fact that claim of loss referred to "counterfeit" as opposed to "forged" checks. MBTA Emp. Credit Union v. Employers Mut. Liab. Ins. Co., 374 F. Supp. 1299 (D. Mass. 1974).

Check which was signed by maker but was blank as to payee and amount was not legally a check within meaning of UCC. State v. Kleen, 491 S.W.2d 244 (Mo. 1973).

17. —Payable to order or bearer.

Check executed and delivered is contract in writing by which drawer contracts with payee that bank will pay to latter or his order amount designated on presentation. Mason v. Blayton, 119 Ga. App. 203, 166 S.E.2d 601 (1969).

Instruments not payable to order of bearer were non-negotiable in sense that there could be no holder in due course thereof; however, under Code § 3-805 and official comment thereto, such instruments are treated as negotiable in other respects and are referred to as checks; being checks within Code, such instruments can be subject of crime of larceny by check. Faulkner v. State, 445 P.2d 815 (Alaska 1968).

A person would be a holder in due course of a negotiable instrument if he acquired it for value and without notice where it was payable to bearer. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

18. —Other matters.

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate's conservatorship. Great S. Nat'l Bank v. Minter, 590 So. 2d 129 (Miss. 1991).

Negotiable orders of withdrawal ("NOW drafts") requiring savings bank to pay specified sum to named third party which (1) are "payable-through" drafts that designate a commercial bank at which they can be presented for payment, (2) clear through banking system in manner similar to traditional checks, and (3) bear legend that gives bank option to require 14 days' notice before making payment, are not checks within meaning of UCC § 3-104(2)(b), since such drafts are not payable on demand. Pennsylvania Bankers Ass'n v. Secretary of Banking, 481 Pa. 332, 392 A.2d 1319 (1978).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son: (1) Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1), and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where bank's refusal to sign was because it had no ownership interest in corporation but only security interest in corporation's assets; (3) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (4) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, buyer's contention that when bank accepted and cashed cashier's checks it became obligated by terms of sale agreement could not be sustained because (1) clear import of Uniform Commercial Code is that negotiable instruments may not be used by parties to express obligations other than obligation stated in UCC § 3-104(1)(b), namely, unconditional promise to pay sum certain; and (2) since terms of sale agreement with respect to such cashier's checks required only that they be made out for specified amounts and be payable to specified copayees, such checks were not affected or modified under UCC § 3-119(1) by terms of sale agreement, but were completely independent of such agreement. In such case, cashier's checks stood on their express terms, bank's acceptance of such checks did not constitute acceptance of terms of separate sale agreement which bank did not sign, and causes of action arising out of such sale agreement were not available against bank. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Negotiability of check is not affected by fact it is drawn in return for creation of debt obligation from payee to drawer which is secured by collateral, nor is such negotiability affected by promise to maintain or protect collateral, and borrower who accepts check representing proceeds of his loan may freely negotiate check as his own property notwithstanding security agreement which secures his obligation to repay. Johnson v. State, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

Use of waiver of defense clause (often, as here, in fine print and couched in technical language which is difficult for the ordinary consumer to appreciate) cannot impart attributes of negotiability to otherwise negotiable instrument. Fairfield Credit Corp. v. Donnelly, 158 Conn. 543, 264 A.2d 547, 39 A.L.R.3d 509 (1969).

The appellant's printed name and address at the top of the check established that he was named in the instrument and that he clothed his agent with authority to possess, issue, and assign checks drawn upon his account, and respondent took the checks, as a holder in due course free from any and all defenses on the part of the appellant. Jenkins v. Evans, 31 A.D.2d 597 (3d Dep't 1968).

Where an employer signs his name to a blank check the improper completion of the check by an employee and his conversion of the proceeds of the check constitutes the crime of embezzling money, as against the argument that the blank check was not a negotiable instrument as it did not contain any order or promise to pay money and was not payable to order or bearer. State v. Moreno, 156 Conn. 233, 240 A.2d 871 (1968).

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

19. Certificate of deposit.

Section 81-5-63 and § 81-12-137, which deal, respectively, with joint deposits in a bank checking account and in a savings account in a savings association, create a presumption of joint tenancy ownership with the right of survivorship. On the other hand, such presumption does not apply to bank issued certificates of deposit held in the names of 2 or more persons, in the absence of express intent on the certificate to create such joint tenancy. Delta Fertilizer, Inc. v. Weaver, 547 So. 2d 800 (Miss. 1989).

Where (1) first bank, which had loaned debtor $20,000 and accepted as collateral nonnegotiable certificate of deposit that first bank had previously issued to debtor, inadvertently delivered renewal certificate to debtor, (2) debtor, instead of returning renewal certificate to first bank, used it as collateral for loan from second bank and gave second bank security interest in renewal certificate that second bank perfected by possession under UCC § 9-304(1), and (3) on debtor's default on both loans, second bank presented renewal certificate to first bank, which dishonored it, court held (1) that second bank was not holder in due course under UCC §§ 3-

302(1) and 3-805 because renewal certificate was nonnegotiable under UCC § 3-104(1)(d), (2) that as a result, second bank was mere assignee of renewal certificate and certificate under assignments statute was subject to first bank's right of setoff, (3) that exclusion of right of setoff from Article 9 protection means that claimant of right of setoff (first bank) against collateral (renewal certificate) is not barred from enforcing such right merely because another creditor (second bank) has perfected security interest in collateral by taking possession thereof, since right of setoff is separate from priority provisions of Article 9, and (4) that as a result, second bank held debtor's renewal certificate subject to any defenses of first bank, which "defenses" included first bank's right of setoff. Bank of Crystal Springs v. First Nat'l Bank, 427 So. 2d 968 (Miss. 1983).

In action to determine whether two certificates of deposit should be included in estate of decedent, certificates of deposit were not negotiable under UCC § 3-104 where there were neither payable to order nor to bearer on their face; certificates of deposit were governed by UCC pursuant to UCC § 3-805 where they satisfied all attributes of negotiable instrument except words of negotiability; cousin of decedent was entitled to one of certificates of deposit where decedent had indorsed it in blank and physically delivered it to him, thereby creating presumption of valid and intentional delivery under UCC § 3-201 of inter vivos gift, and where this presumption was not overcome by evidence that periodic interests payments which accrued on certificate continued to be deposited into separate savings account belonging to decedent. Rand v. Moore, 414 So. 2d 885 (Miss. 1981).

Certificate of deposit issued by bank which (1) represented deposit of specified sum by decedent, (2) was payable in the alternative to decedent or to plaintiff-claimant of certificate's proceeds, (3) had not been negotiated to plaintiff in accordance with UCC § 3-116(a), but was still in decedent's possession at time of her death, and (4) contained no reference to survivorship rights, was in decedent's possession as holder in due course and thus was part of her estate when she died (holding that Uniform Commercial Code controls certificates of deposit which comply with UCC § 3-104(2)(c)). Thomas v. Estate of Eubanks, 358 So. 2d 709 (Miss. 1978).

Certificate of deposit which was not payable to order or to bearer, but was payable only on return of instrument properly indorsed, was not negotiable instrument under UCC § 3-104(1)(d) and § 3-110(2). Kaw Valley State Bank & Trust v. Commercial Bank of Liberty, 567 S.W.2d 710 (App. 1978).

Where statutory requirements are met, certificate of deposit becomes negotiable instrument carrying with it obligation on part of depositary bank to repay receipt of money given to it by its depositor; thus, where depositor transferred certificates of deposit to lending bank as collateral for loan, security interest of lending bank in certificates of deposit included and extended to unidentified funds on deposit by depositor at depositary bank which would pay certificates when due, and depositary bank was precluded from setting off against certificates depositor's obligations to depositary bank. First Wisconsin Nat'l Bank v. Midland Nat'l Bank, 76 Wis. 2d 662, 251 N.W.2d 829 (1977).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104; since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. Jones v. United Sav. & Loan Ass'n, 515 S.W.2d 869 (Mo. Ct. App. 1974).

Certificate of deposit, which contained unconditional promise to pay certain sum of money absolutely, had all essential elements of promissory note and should be governed by same rules as promissory note with reference to creation of joint-tenancy rights therein. In re Estate of Baxter, 56 Ill. 2d 223, 306 N.E.2d 304 (1973).

20. Note.

Where promissory note was not negotiable under UCC § 3-104(1), liability of signer of such note was not controlled by

Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). Central States, S.E. & S.W. Areas, Health & Welfare Fund v. Pitman, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

Note was negotiable notwithstanding it contained acceleration clause and clause confessing judgment on instrument if not paid when due, since UCC §§ 3-109 and 3-112(d), respectively, authorize such clauses. Broadway Mgt. Corp. v. Briggs, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

Promissory notes which stated "Buyer agrees to pay to Seller..." were not negotiable instruments, assignee of such notes was not holder in due course thereof, and, thus, trial court erred in refusing to consider evidence in support of maker's affirmative defenses. Locke v. Aetna Acceptance Corp., 309 So. 2d 43 (Fla. App. 1975).

Assignee of promissory note qualified as "holder" under UCC § 1-201(20), but provision that judgment could be confessed "at any time hereafter" rendered note non-negotiable under UCC § 3-112(d) and outside scope of Code. Shatz v. Dunn, 18 Ill. App. 3d 390, 309 N.E.2d 702 (5th Dist. 1974).

UCC does not require that negotiable note be payable "to order or to bearer" in haec verba; these are alternative requirements and it is necessary to comply with only one of them. First Nat'l City Bank v. Valentine, 62 Misc. 2d 719 (1970).

A note is an irrevocable promise to pay made by the maker. Mott v. Sewickley Sav. & Loan Ass'n, 211 Pa. Super. 357, 236 A.2d 541 (1967).

21. —Additional powers or provisions.

The provision in a note for "interest after maturity at the highest lawful" rate does not render the note non-negotiable for failure to state a sum certain as required by § 3-104(1)(b) because, there being no agreement in writing for any other rate after default, the interest rate after maturity would be that indicated in c 107, § 3 which would make the note equivalent to one payable "with interest," which latter type of note would clearly be negotiable under c 106. § 3-118(d). Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

Evidence that a note and a contract completion certificate were "together" at one stage of a transaction does not justify an inference that the note and completion certificate were "part of the same instrument" and that an additional obligation in the completion certificate rendered the note non-negotiable under subsection (1)(b) of the instant section. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

A clause in a note which makes credit life insurance available to the maker does not affect negotiability of the note under subsection (1)(b) because it is clear that the "no other promise" provision therein refers only to promises by maker. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

The addition of the power to confess judgment at any time destroyed the negotiability of a note. Atlas Credit Corp. v. Leonard, 15 Pa. D. & C.2d 292 (1957).

22. —Relationship with contracts or other documents.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

Two notes which were issued subject to separate agreement between makers and payee were not negotiable instruments within meaning of Article 3 of Uniform Commercial Code. TMA Fund, Inc. v. Biever, 380 F. Supp. 1248 (E.D. Pa. 1974), appeal dismissed, 520 F.2d 639 (3d Cir. Pa. 1975), aff'd, 532 F.2d 747 (3d Cir. Pa. 1976).

Where note bears legend "as per contract," this fact does not prevent it from containing unconditional promise within provision of § 3-104, subd b, since § 3-105, subd 1(c) provides that promise is not made conditional by fact that instrument refers to or states that it arises out of separate agreement. Such legend does not affect the negotiability of the instrument as would statement that instrument is subject to or governed by any other agreement as is provided by § 105, subd 2(a). D'Andrea v. Feinberg, 45 Misc. 2d 270 (1965).

The negotiability of a note is not affected by the fact that it was originally physically attached to a conditional sales contract. Congress Fin. Corp. v. J-K Coin Op Equip. Co., 353 F.2d 683 (7th Cir. Ind. 1965).

The negotiability of a note is not affected by a variance between it and a written contract where there is nothing in the note to indicate that it is subject to the terms of the contract. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

23. —Requirement that note be unconditional.

Note was not negotiable instrument under UCC § 3-104(1) where promise to pay contained in instrument was conditional and instrument also contained express restriction that it could not be transferred, pledged, or assigned by payee without written consent of maker. First State Bank v. Clark, 91 N.M. 117, 570 P.2d 1144 (1977).

Writings on reverse side of paid note and on accompanying envelope, signed by decedent, stating that decedent's son and another loaned decedent money to pay note, that decedent wanted this paid out of his estate, and that he owed his son and the other person a certain sum of money, did not fall within classification of promissory note in statute of limitations since writings failed to provide for payment absolutely and unconditionally. Estate of Garrett v. Garrett, 24 Ill. App. 3d 895, 322 N.E.2d 213 (2d Dist. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

The requirement that the instrument contain an unconditional order or promise to pay a sum certain in money is not retroactive. United States v. Farrington, 172 F. Supp. 797 (D. Mass. 1959).

24. —Time for payment.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App. 565, 222 S.E.2d 126 (1975).

Instrument made payable "at the earliest possible time" was not payable at definite time, nor was phrase "at the earliest possible time" equivalent to no time for payment being stated in instrument; hence, it was not negotiable demand note. Williams v. Cooper, 504 S.W.2d 564 (Tex. Civ. App. 1973).

Notes payable to bank which were silent as to time when confession of judgment could occur were non-negotiable and were not governed by UCC. von Frank v. Hershey Nat'l Bank, 269 Md. 138, 306 A.2d 207 (1973).

Instruments payable on demand include those in which no time for payment is stated. Erickson v. Newell, 183 Neb. 641, 163 N.W.2d 286 (1968).

25. Bonds, warrants and other government obligations.

Under UCC § 3-104(1)(b) and (d), bond which was not payable in sum certain, and which also was not expressly payable to order or to bearer, was not negotiable instrument. Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co., 459 F. Supp. 328 (N.D. Ga. 1978), aff'd, 624 F.2d 722 (5th Cir. Ga. 1980).

Warrant issued by governmental levee district directing state comptroller to pay construction company sum certain was "negotiable instrument" under UCC § 3-104(1), and under UCC § 3-105(1)(g), dealing with instruments issued by governmental agencies, unconditional promise to pay contained in warrant was not made conditional by fact that instrument was limited to payment of particular fund or proceeds of particular source. St. James Bank & Trust Co. v. Board of Comm'rs, 354 So. 2d 233 (La. App. 1978).

In action by bank to recover funds paid by it in exchange for warrant issued by governmental levee district, district's contention that even if warrant should qualify as negotiable instrument under UCC § 3-104(1) and § 3-105(1)(g), it was still collection item and bank should not have advanced its funds until warrant cleared state comptroller and funds were paid by state treasurer could not be sustained, since warrant either was or was not a negotiable instrument, and the law does not recognize a particular category of negotiable instruments that are somehow less negotiable because they are bank collection items. St. James Bank & Trust Co. v. Board of Comm'rs, 354 So. 2d 233 (La. App. 1978).

Revenue bonds and coupons with indefinite interest rate provisions are not negotiable instruments because of failure to meet "sum certain" requirement. Brazos River Auth. v. Carr, 405 S.W.2d 689 (Tex. 1966).

Bonds and their coupons issued by public authority which provide for the payment of an indefinite rate of interest are not negotiable, and neither statute authorizing authority to issue negotiable bonds nor a resolution of the authority declaring the bonds to be negotiable alters the fact. Brazos River Auth. v. Carr, 405 S.W.2d 689 (Tex. 1966).

26. Money order.

Money order which was signed by alleged drawer, contained unconditional order to pay sum certain in money, was payable on demand and to order of specified person and was not drawn on bank, was draft or bill of exchange. People v. Peace, 48 Mich. App. 79, 210 N.W.2d 116 (1973).

A bank money order which does not require the signature of the issuer is subject to a stop payment order. Krom v. Chemical Bank N.Y. Trust Co., 38 A.D.2d 871 (3d Dep't 1972).

Money orders which were not "payable to order or to bearer" but made "payable to" named payee were not negotiable. Nation-Wide Check Corp. v. Banks, 260 A.2d 367 (D.C. 1969).

Postal money order resembles negotiable instrument in many but not all respects. See United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

A so-called "Personal Money Order-Register Check", which bears no signature whatsoever at the time of its purchase from the drawee bank, does not become a negotiable instrument until the purchaser fills in the name of a payee and signs it himself as the drawer. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

Bogus money orders, although meeting the other requirements of this section and simulating negotiable instruments in form, are not negotiable when not payable to order or bearer. Strauss v. State, 113 Ga. App. 90, 147 S.E.2d 367 (1966).

27. Retail installment contract.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

Retail installment contract for sale of mobile home and security agreement which were combined into one instrument, and which involved promises, obligations, and powers in addition to those declared by UCC § 3-104(1) to be essential for negotiability of a writing, was not a negotiable instrument. Wickware v. National Mtg. Corp. of Am., 570 P.2d 330 (Okla. 1977).

In action by assignee of retail installment contracts, waiver of defenses clause in contract signed by purchasers was effective where assignee purchased contract for value, in good faith, and without notice of any claim or defense. Although retail installment contracts are not negotiable instruments within meaning of UCC § 3-104, standards set forth in UCC § 9-206(1) relating to such instruments are equally applicable in determining whether assignee is entitled to protection of waiver of defense clause. Personal Fin. Co. v. Meredith, 39 Ill. App. 3d 695, 350 N.E.2d 781 (5th Dist. 1976).

There was sufficient doubt that instrument designated as "Retail Installment Contract & Security Agreement" was negotiable instrument, so as to preclude granting summary judgment in face of allegations of lawful defenses, where there was no clear indication that amount of obligation was payable to order or to bearer, where document provided for repossession of collateral by seller without judicial process contrary to requirements of UCC § 3-104(1)(b), and where seller retained purchase money security interest. Pacific Fin. Loans v. Goodwin, 41 Ohio App. 2d 141, 324 N.E.2d 578 (1974).

Instrument denominated "Retail Instalment Contract" which showed "seller" to be business college and described articles sold or services rendered as "Med. Secretary Course," with cash price of $490, and which contained provision waiving defenses against assignee thereof, was not negotiable instrument as defined by UCC §§ 3-104 through 3-112, but came within Retail Instalment and Home Solicitation Sales Act. Grimes v. Community Loan & Inv. Corp., 130 Ga. App. 8, 202 S.E.2d 265 (1973).

By c. 255, § 12C, inserted by St. 1961, c. 595, certain notes given in connection with the sale of consumer goods are made non-negotiable. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

28. Traveler's check.

Traveller's check is negotiable instrument within meaning of UCC Article 3 (see UCC § 3-104(1) and Official Comment 4). Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

American Express Travellers checks, which party to whom such checks were given as payment for merchandise saw holder sign and countersign, but which holder did not date or make payable to plaintiff and which plaintiff never completed although he had authority to do so, were incomplete and unenforceable as matter of of law, since omission of payee's name rendered checks nonnegotiable under UCC § 3-104(1)(d), which requires that any writing to be negotiable instrument must be payable "to order" or "to bearer." (holding, however, that failure to date checks did not affect their negotiability since UCC § 3-114 expressly permits instruments otherwise negotiable to be undated). Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

29. Withdrawal order.

Negotiable orders of withdrawal ("NOW drafts") requiring savings bank to pay specified sum to named third party which (1) are "payable-through" drafts that designate a commercial bank at which they can be presented for payment, (2) clear through banking system in manner similar to traditional checks, and (3) bear legend that gives bank option to require 14 days' notice before making payment, are not checks within meaning of UCC § 3-104(2)(b), since such drafts are not payable on demand. Pennsylvania Bankers Ass'n v. Secretary of Banking, 481 Pa. 332, 392 A.2d 1319 (1978).

A withdrawal order possesses the attributes of negotiability required by UCC § 3-104(1) since it is an unconditional order to the bank signed by the drawer and depositor to pay a specified sum, and it is payable to order and on demand. Consumers Sav. Bank v. Commissioner of Banks, 361 Mass. 717, 282 N.E.2d 416, 64 A.L.R.3d 1310 (1972).

30. "Draft," "Check" or other terms applied to non-negotiable instruments.

Under UCC § 3-104(1)(b) and (d), bond which was not payable in sum certain, and which also was not expressly payable to order or to bearer, was not negotiable instrument. Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co., 459 F. Supp. 328 (N.D. Ga. 1978), aff'd, 624 F.2d 722 (5th Cir. Ga. 1980).

Where promissory note was not negotiable under UCC § 3-104(1), liability of signer of such note was not controlled by Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). Central States, S.E. & S.W. Areas, Health & Welfare Fund v. Pitman, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

Where defendant contended in prosecution for passing bad checks (1) that statute under which he was being prosecuted applied only to negotiable instruments, (2) that sales drafts in case at bar were not negotiable, and (3) that Uniform Commercial Code supported defendant's view that such drafts were not negotiable, court would conclude that even if Uniform Commercial Code could be resorted to for interpretation of criminal statutes, it did not support defendant's contention, since UCC § 3-104(3) specifically states that terms "draft" and "check" may refer to both negotiable and nonnegotiable instruments. Commonwealth v. Schwartz, 250 Pa. Super. 455, 378 A.2d 1237 (1977).

Draft payable to two named payees without addition of words "or order" or any similar words of negotiability was not negotiable instrument within meaning of UCC. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

31. Confession of judgment.

Demand note with clause authorizing confession of judgment "at any time," whether or not default had occurred (i. e., without demand for payment), was nonnegotiable under UCC § 3-112(1)(d). Cheltenham Nat'l Bank v. Snelling, 230 Pa. Super. 498, 326 A.2d 557 (1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1955, 44 L. Ed. 2d 453 (1975).

Notes payable to bank which were silent as to time when confession of judgment could occur were non-negotiable and were not governed by UCC. von Frank v. Hershey Nat'l Bank, 269 Md. 138, 306 A.2d 207 (1973).

Obligation permitting confession of judgment at any time, as distinguished from "upon default", is not negotiable within UCC § 3-112(1)(d). Blake-Cadillac Oldsmobile, Inc. v. Cackovic, 54 Pa. D. & C.2d 160 (1971).

The presence of a confession of judgment clause does not affect negotiability where it is so limited that judgment may not be entered before default. Vain v. Gordon, 249 Md. 134, 238 A.2d 872 (1968).

Despite the provisions of subsection (1)(d) judgment notes in use in Pennsylvania are not negotiable when they provide that judgment may be entered before the amount is due, and this subsection is construed to mean that a confession of judgment may be authorized only if the instrument is not paid when due. Smith v. Lenchner, 204 Pa. Super. 500, 205 A.2d 626 (Super. 1964).

A note containing a warrant to confess judgment at any time is a non-negotiable instrument, and hence a note authorizing a confession of judgment "as of any term" was not negotiable. Bittner v. McGrath, 186 Pa. Super. 477, 142 A.2d 323 (Super. 1958).

The addition of the power to confess judgment at any time destroyed the negotiability of a note. Atlas Credit Corp. v. Leonard, 15 Pa. D. & C.2d 292 (1957).

Although the type of authority to confess judgments which will not affect negotiability is stated slightly different in this section, the rule is the same as it was under the Negotiable Instruments Law. Atlas Credit Corp. v. Leonard, 15 Pa. D. & C.2d 292 (1957).

32. Miscellaneous instruments.

Since letters of credit are not negotiable instruments as defined by UCC § 3-104(1), bank did not become holder in due course merely by accepting them as security for loans; bank, as assignee of letters of credit which were not expressly transferable, only had right to receive drafts properly drawn by beneficiary pursuant to UCC § 5-116. Shaffer v. Brooklyn Park Garden Apts., 311 Minn. 452, 250 N.W.2d 172 (1977).

The promise of the maker of an instrument to pay a sum certain is not rendered condition by the grant of authority to the payee or assignee to cancel an insurance policy in the event of default, and apply the return premiums against the unpaid balance. Standard Premium Plan Corp. v. Hirschorn, 56 Misc. 2d 687 (1968).

III. DECISIONS UNDER FORMER STATUTES.

33. Decisions under former Code 1942 § 42.

The statute applies to negotiable instruments only, to the exclusion of non-negotiable. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

A check is a negotiable instrument. Presley v. American Guarantee & Liab. Ins. Co., 237 Miss. 807, 116 So. 2d 410 (1959).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank a purchase order signed by the maker-purchaser in favor of the seller-payee, on the reverse side of which there was a "warranty and agreement," did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. Misso v. National Bank of Commerce, 231 Miss. 249, 95 So. 2d 124 (1957).

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except as an implied guarantor that instruments are genuine, that he has good title to them, and that he is not aware of any illegality. Home Ins. Co. v. Citizens Bank, 181 Miss. 181, 178 So. 589 (1938).

Where insurer purchased from mortgagee a mortgage on insured premises and mortgage note after fire loss, and mortgagee indorsed instruments "without recourse," insurer could not recover from mortgagee as a guarantor on ground that premises were mortgagor's homestead, contrary to recital in mortgage, and that mortgagor's wife had not joined in execution of mortgage, in absence of showing that mortgagee had made any false representations to insurer in regard to those matters. Home Ins. Co. v. Citizens Bank, 181 Miss. 181, 178 So. 589 (1938).

Where first indorser on note payable to bank paid bank receiver certain sum and receiver gave receipt releasing indorser from further liability on note and the compromise settlement was made by authority of chancery court, decree authorizing discharge of first indorser and holding of second indorser was unauthorized where made without second indorser's consent. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

Maker, by executing trade acceptances, admitted existence of corporate payee, and its capacity to indorse paper, and could not defeat liability on ground that amended charter changing name of corporation to that used in trade acceptances was not filed until four days after execution of acceptances. Betlyn Sec. Corp. v. Bates, 177 Miss. 41, 170 So. 301 (1936).

Purchaser of trade acceptances for cash consideration before due dates without notice of infirmities or defects in instruments held "holder for value, without notice," notwithstanding certificates were executed in favor of corporation after it had resolved to change its name to that used as payee in certificates, but before corporation had filed its amended charter. Betlyn Sec. Corp. v. Bates, 177 Miss. 41, 170 So. 301 (1936).

Where note was otherwise in form of negotiable instrument, recital on face of note that it was subject to and part of contract of sale, referring to incomplete, unexecuted, conditional sales contract in printed form on back of note, held not to render note non-negotiable. Jones v. First Nat'l Bank, 170 Miss. 857, 155 So. 173 (1934).

In suit on negotiable note, maker's defense based on oral agreement that note was payable in merchandise from maker's store, held not available as against holder in due course, for value and without notice of oral agreement. Jones v. First Nat'l Bank, 170 Miss. 857, 155 So. 173 (1934).

Notes must be payable to order or bearer, and, when payable to order, payee must be named. Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

Automobile sales contract not payable to order or bearer is not negotiable instrument. J.W. McNees Motor Co. v. Brumfield, 157 Miss. 132, 126 So. 898 (1930).

Maker of automobile purchase contract may defend against it for fraud in procurement against purchaser for value without notice, or contract may be cancelled in equity. J.W. McNees Motor Co. v. Brumfield, 157 Miss. 132, 126 So. 898 (1930).

A statute authorizing discharge of surety or accommodation indorser on creditor's failure to commence proceedings after giving him notice in writing was not repealed by the Negotiable Instruments Act. First Nat'l Bank v. Rau, 146 Miss. 520, 112 So. 688 (1927).

One acquiring demand note for value without notice in reasonable time after execution held "holder in due course." Wilson v. Stark, 146 Miss. 498, 112 So. 390 (1927).

Failure to place federal revenue stamp on instrument does not affect negotiability. Currie-McGraw Co. v. Friedman, 135 Miss. 701, 100 So. 273 (1924).

Negotiable instruments law held not to repeal law declaring void notes given for intoxicating liquors. Elkin Henson Grain Co. v. White, 134 Miss. 203, 98 So. 531 (1924).

Breach of maker's contemporary agreement no defense against bona fide holder. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

Failure of consideration no defense against bona fide purchaser. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

Failure of corporation payee to file charter as condition to doing business no defense against bona fide holder. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

34. Decisions under former Code 1942 § 51.

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

35. Decisions under former Code 1942 § 167.

A check is a bill of exchange under this section. Presley v. American Guarantee & Liab. Ins. Co., 237 Miss. 807, 116 So. 2d 410 (1959).

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff, was a "bill of exchange," on which drawer was primarily liable and attorney secondarily liable. Parrish v. Feldman, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

A bank properly declined to honor a check (defined in § 226, Code 1942, as a "bill of exchange drawn on a bank payable on demand"), intended as a gift of the amount of money called for, where it was not presented for payment until after the death of the maker. Smythe v. Sanders, 136 Miss. 382, 101 So. 435 (1924).

36. Decisions under former Code 1942 § 225.

Generally rights and obligations of parties are governed by laws of state wherein note is payable. M. Levy & Sons v. Jeffords, 141 Miss. 818, 105 So. 1 (1925).

Where declaration does not allege or admit note signed by a certain person such fact cannot be raised by demurrer though the note is filed as an exhibit. Hodges v. Mills, 139 Miss. 347, 104 So. 165 (1925).

37. Decisions under former Code 1942 § 226.

A check is a bill of exchange under this section. Presley v. American Guarantee & Liab. Ins. Co., 237 Miss. 807, 116 So. 2d 410 (1959).

A novation is good consideration for a bill or note. Greenwood Leflore Hosp. Comm'n v. Turner, 213 Miss. 200, 56 So. 2d 496 (1952).

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff was a "bill of exchange" on which drawer was primarily liable and attorney secondarily liable. Parrish v. Feldman, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Indorsee of check is presumed prima facie to be privy to indorser's fraud in obtaining it. Mississippi Valley Trust Co. v. Brewer, 151 Miss. 170, 117 So. 540 (1928).

"Check" is bill of exchange drawn on bank payable on demand. Smythe v. Sanders, 136 Miss. 382, 101 So. 435 (1924).

Attempted gift of money by check not cashed during lifetime of drawer is revoked by his death. Smythe v. Sanders, 136 Miss. 382, 101 So. 435 (1924).

No delivery of gift by bank check, unless cashed in lifetime of donor. Smythe v. Sanders, 136 Miss. 382, 101 So. 435 (1924).

Cashier's check is bill of exchange. Anderson v. Bank of Tupelo, 135 Miss. 351, 100 So. 179 (1924).

Check is a negotiable instrument. Bank of Gulfport v. Smith, 132 Miss. 63, 95 So. 785 (1923).

ATTORNEY GENERAL OPINIONS

A submitted document did not contain an unconditional promise to pay a sum certain in money on demand or at a definite time and, therefore, appeared to be a simple contract, but not a promissory note. Gunn, Feb. 11, 2000, A.G. Op. #2000-0053.

RESEARCH REFERENCES

ALR. What constitutes "money" within meaning of Uniform Commercial Code. 40 A.L.R.4th 346.

Effect on negotiability of instrument, under terms of UCC § 3-104(1), of statements expressly limiting negotiability or transferability. 58 A.L.R.4th 632.

When is instrument "payable on demand or at a definite time" as required to constitute negotiable instrument under §§ 3-104(a)(2), 3-108(a,b) of Uniform Commercial Code. 71 A.L.R.5th 443.

What constitutes undertaking or instruction to do any act in addition to payment of money as limitation on definition of negotiable instrument under UCC § 3-104. 75 A.L.R.5th 559.

What constitutes "fixed amount of money" for purposes of § 3-104 of Uniform Commercial Code providing that negotiable instrument must contain unconditional promise to pay fixed amount of money. 76 A.L.R.5th 289.

When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-10(a)(1) and 3-109. 77 A.L.R.5th 523.

Certificate of deposit as "security" under federal securities laws. 82 A.L.R. Fed. 553.

Am Jur. 29 Am. Jur. Proof of Facts 2d 83, Sufficiency of Debtor's Direction as to Application of Payment.

§ 75-3-105. Issue of instrument.

(a) "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument.

SOURCES: Former § 75-3-105: Codes, 1942, § 41A:3-105; Laws, 1966, ch. 316, § 3-105; Laws, 1992, ch. 420, § 5, eff from and after January 1, 1993.

§ 75-3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of Section 75-3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record. A reference to another record does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another record for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of Section 75-3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 75-3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

SOURCES: Former § 75-3-106: Codes, 1942, § 41A:3-106; Laws, 1966, ch. 316, § 3-106; Laws, 1988, ch. 333; Laws, 1992, ch. 420, § 6; Laws, 2010, ch. 506, § 14, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-105.

11. In general.
12. Unconditional promises.
13. —Statement of consideration or "as per" contract.
14. —Obligation secured by mortgage.
15. —Government obligation limited to particular fund for payment.
16. Conditional promises.
17. —Subject to another agreement.
18. —Payment limited to particular source.

III. DECISIONS UNDER FORMER STATUTES.

19. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-105.

11. In general.

In action by bank to recover funds paid by it in exchange for warrant issued by governmental levee district, district's contention that even if warrant should qualify as negotiable instrument under UCC § 3-104(1) and § 3-105(1)(g), it was still collection item and bank should not have advanced its funds until warrant cleared state comptroller and funds were paid by state treasurer could not be sustained, since warrant either was or was not a negotiable instrument, and the law does not recognize a particular category of negotiable instruments that are somehow less negotiable because they are bank collection items. St. James Bank & Trust Co. v. Board of Comm'rs, 354 So. 2d 233 (La. App. 1978).

Under UCC § 3-105 and Official Comment thereto, as far as negotiability is concerned, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself. When the instrument itself makes express reference to an outside agreement, transaction, or document, the effect on the instrument's negotiability will depend on the nature of the reference. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Where buy-sell agreement for purchase of dress shop stated that balance was to be financed through SBA participation loan, where buyer did not have loan at time of closing and seller agreed to take note in lieu of cash, and where written act of sale executed at same time stated that sale was made pursuant to agreement executed previously by vendors and vendee, parol testimony of parties concerning their intention was admissible pursuant to UCC § 3-119(1), but buyer-maker did not sustain burden of proof that payment of note was conditioned on his obtaining SBA loan. Demaio v. Theriot, 343 So. 2d 1143 (La. App. 1977), writ denied, 346 So. 2d 218 (La. 1977).

12. Unconditional promises.

An instrument is not made nonnegotiable because it states the obligation in payment of which it is made. Anderson v. Consolidated Auto Wholesalers, Inc., 4 U.C.C. Rep. Serv. 205 (1967, NY Sup).

13. —Statement of consideration or "as per" contract.

The recital in a promissory note "as per contract" does not affect its negotiability. New York Plumbers Specialties Co. v. Valco Homes, Inc., 4 U.C.C. Rep. Serv. 587 (1967, NY Sup).

Where note bears legend "as per contract," this fact does not prevent it from containing an unconditional promise within provision of § 3-104, subd b, since § 3-105, subd 1(c) provides that promise is not made conditional by fact that instrument refers to or states that it arises out of separate agreement. Such legend does not affect negotiability of instrument as would statement that instrument is subject to or governed by any other agreement as is provided by § 105, subd 2(a). D'Andrea v. Feinberg, 45 Misc. 2d 270 (1965).

14. —Obligation secured by mortgage.

Where note and mortgage were executed simultaneously, note provided that all terms of mortgage were thereby made part of note, and terms of mortgage made it patent that mortgagees could look only to mortgage property to recover debt, assignees of portion of mortgage note were not holders in due course and were subject to limitation in mortgage precluding deficiency judgment. Stern v. Itkin Bros., 87 Misc. 2d 538 (1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

15. —Government obligation limited to particular fund for payment.

Warrant issued by governmental levee district directing state comptroller to pay construction company sum certain was "negotiable instrument" under UCC § 3-104(1), and under UCC § 3-105(1)(g), dealing with instruments issued by governmental agencies, unconditional promise to pay contained in warrant was not made conditional by fact that instrument was limited to payment of particular fund or proceeds of particular source. St. James Bank & Trust Co. v. Board of Comm'rs, 354 So. 2d 233 (La. App. 1978).

Promise to pay by governmental agency or unit is unconditional even though limited to particular fund. Brazos River Auth. v. Carr, 405 S.W.2d 689 (Tex. 1966).

16. Conditional promises.

The fact that the payee of an instrument assigns the instrument to another "subject to their acceptance" does not render it conditional, for that is not a condition of payment, but merely a condition precedent before the instrument comes into being-a credit approval-which gives rise to the instrument. Standard Premium Plan Corp. v. Hirschorn, 56 Misc. 2d 687 (1968).

17. —Subject to another agreement.

Promissory note that stated that it was in lieu of property settlement supplementing prior deed of separation and property settlement, and that such prior deed and property settlement were incorporated into note by reference, was not negotiable, since parties by incorporating prior deed and property settlement into instrument made it subject to all conditions that might possibly be contained in incorporated documents, so as to render sum certain agreed to be paid in note "conditional" within meaning of UCC § 3-105(2)(a) (stating that whether documents incorporated into note in suit actually contained any conditions that might affect maker's promise to pay was immaterial, and that basic point involved is that when a note incorporates other documents by reference into its provisions, essential terms of note cannot be ascertained from face of instrument itself). Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Two notes which were issued subject to separate agreement between makers and payee were not negotiable instruments within meaning of Article 3 of Uniform Commercial Code. TMA Fund, Inc. v. Biever, 380 F. Supp. 1248 (E.D. Pa. 1974), appeal dismissed, 520 F.2d 639 (3d Cir. Pa. 1975), aff'd, 532 F.2d 747 (3d Cir. Pa. 1976).

Subd 1(c) is intended to resolve conflict and to reject cases in which a reference to separate agreement has been held to mean that payment of instrument must be limited in accordance with terms of such agreement and hence was conditioned by it. D'Andrea v. Feinberg, 45 Misc. 2d 270 (1965).

It has been said that the probable meaning of subparagraph (2)(a) is that a reference to any other agreement destroys negotiability even though the agreement referred to does not, in fact, impose any condition or contingency upon the promise to pay. Subparagraph (2)(a) however, is to be compared with subparagraph (1)(e) of the instant section. United States v. Farrington, 172 F. Supp. 797 (D. Mass. 1959).

18. —Payment limited to particular source.

In action against endorser of promissory note which was to be repaid from cigarette vending machine sales, summary judgment for payee was reversed where there was factual dispute as to whether parties intended instrument to be paid only out of specific fund, in which case note would be rendered "not unconditional" under UCC § 3-105(2)(b). Rothenberg v. Mellow Music, Inc., 291 So. 2d 234 (Fla. App. 1974).

Agreement to pay "within the next 60 days the sum of $5,000 from the jobs now under construction" did not contain an unconditional promise to pay and therefore was not a negotiable instrument and the language was ambiguous as to whether payment was to be made from gross receipts or solely if profits existed and evidence as to such question would clearly be admissible particularly since the additional terms sought to be developed were not inconsistent with the existing agreement. Webb & Sons v. Hamilton, 30 A.D.2d 597 (3d Dep't 1968).

III. DECISIONS UNDER FORMER STATUTES.

19. In general.

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except implied guaranty that instruments are genuine, he has good title to them, and he is not aware of any illegality. Home Ins. Co. v. Citizens Bank, 181 Miss. 181, 178 So. 589 (1938).

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

RESEARCH REFERENCES

ALR. Provision in draft or note directing payment "on acceptance" as affecting negotiability. 19 A.L.R.4th 1268.

§ 75-3-107. Instrument payable in foreign money.

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

SOURCES: Former § 75-3-107: Codes, 1942, § 41A:3-107; Laws, 1966, ch. 316, § 3-107; Laws, 1992, ch. 420, § 7, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. What constitutes "money" within meaning of Uniform Commercial Code. 40 A.L.R.4th 346.

§ 75-3-108. Payable on demand or at definite time.

(a) A promise or order is "payable on demand" if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.

(b) A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

SOURCES: Former § 75-3-108: Codes, 1942, § 41A:3-108; Laws, 1966, ch. 316, § 3-108; Laws, 1992, ch. 420, § 8, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. In general.
2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-108, 75-3-109.

11. In general.
12. Payable at sight.
13. No time stated.
14. Instrument not payable on demand.
15. Payable on demand.
16. Acceleration clause.
17. Post dated check.

I. DECISIONS UNDER CURRENT LAW.

1. In general.

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Complaint alleging violations of Miss. Code Ann. § 75-2A-108 concerning forced insurance for loans accrued on the dates of plaintiff borrower's disclosure statement, and absent evidence of an affirmative act preventing the borrower from discovering the claims, the three-year Mississippi statute of limitations, Miss. Code Ann. § 15-1-49(1) was not tolled and the claims were time-barred. Johnson v. Citifinancial, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22527 (S.D. Miss. Feb. 7, 2003).

Holder in due course of note, materially altered by blank date of payment being filled in, can recover on it according to original tenor. Wilson v. Stark, 146 Miss. 498, 112 So. 390 (1927).

Demand note providing for interest held not to mature and set statute running till demand. Shapleigh Hdwe. Co. v. Spiro, 141 Miss. 38, 106 So. 209, 44 A.L.R. 393 (1925).

Note endorsed and delivered when overdue is, as regards person issuing or endorsing it, payable on demand and subject to the laws governing such paper. Carter

v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-108, 75-3-109.

11. In general.

Provisions of UCC § 3-109 as to definite time for payment could in no way alter meaning of "definite" or "indefinite" as used in Internal Revenue Code for purpose of valuation of notes in determining tax liability. Caruth v. United States, 566 F.2d 901 (5th Cir. Tex. 1978).

Where instrument for payment of money was written on personalized check form, individual defendants' names were printed at top of form and their signatures appeared at bottom right-hand corner, where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of $12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. Kaminsky v. Van Dusen, 88 Misc. 2d 833 (1976).

Statute of limitations on note payable "30 days after demand" began running on making of note, and suit to enforce note was therefore time barred when brought more than six years after note was executed. Environics, Inc. v. Pratt, 50 A.D.2d 552 (1st Dep't 1975).

Demand note is payable immediately on date of its execution; thus, bank had right to offset unpaid balance of loan evidenced by demand notes against maker's checking account deposits in bank without prior notice, notwithstanding facts that maker's obligations were secured by collateral pursuant to security agreements, that money had been loaned over period of years, and that bank notified debtors of maker's accounts receivable to pay directly to bank. Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank, 10 Wash. App. 530, 518 P.2d 734 (1974), review denied, 83 Wash. 2d 1013 (1974), cert. denied, 419 U.S. 967, 95 S. Ct. 231, 42 L. Ed. 2d 183 (1974).

A note payable on demand is due immediately after delivery, without further notice or demand. Flintkote Co. v. Grimes, 281 Ala. 707, 208 So. 2d 87 (1968).

When a note is payable on demand, parol evidence is not admissible to change the maturity of the note. Flintkote Co. v. Grimes, 281 Ala. 707, 208 So. 2d 87 (1968).

A note payable "within ten (10) years after date" is payable at a fixed or determinable future time within the meaning of subd. (1) of this section, for the quoted phrase is the equivalent of "on or before ten (10) years after date," payment could not be demanded until expiration of the ten-year period, and an earlier maturity date could not be established by parol evidence. Ferri v. Sylvia, 100 R.I. 270, 214 A.2d 470 (1965).

12. Payable at sight.

A sight draft is forwarded in commercial transactions in order to insure that payment will occur on or before the delivery of goods. A sight draft is a document written by the seller to be paid to the order of the seller, with the buyer as the drawee; it is not, therefore, an ordinary draft which is drawn and tendered by the drawee. McCollum Aviation, Inc. v. CIM Assocs., 446 F. Supp. 511 (S.D. Fla. 1978).

In action against drawer to recover on draft which provided, before space for payee's name, "at sight when approved pay to order of," "at sight" was equivalent to being payable on demand under UCC § 3-108 and where draft, which was payable through bank, did not authorize bank to make payment under UCC § 3-120, approval referred to in quoted phrase was interpreted to require approval by drawer by insertion of authorized signature rather than approval of bank through which draft was made payable. Oneida Nat'l Bank & Trust Co. v. Allstate Ins. Co., 76 Misc. 2d 1062 (1974).

13. No time stated.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) $________," and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee-and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)-because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. Horney v. Covington County Bank, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 8, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payer bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Under UCC § 3-108, undated promissory notes are not invalid but are payable on demand. Nuri Farhadi, Inc. v. Anavian, 58 A.D.2d 546 (1st Dep't 1977).

Check was demand instrument under UCC § 3-108 where no date for payment was indicated. Turner v. State, 508 S.W.2d 861 (Tex. Civ. App. 1974).

In action by holder of note against makers who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder's taking of note dated June 30, 1972, on July 14, 1972, was within "a reasonable length of time after its issue" under UCC § 3-304(3)(c); and (3) since note was not overdue when holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and

3-415(2). Gill v. Commonwealth Nat'l Bank, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

Note which does not state time for payment is demand note; language "interest payable biweekly" does not make note payable at fixed time. Davis v. Dennis, 448 S.W.2d 495 (Tex. Civ. App. 1969).

Note stating no time for payment is payable on demand; allegedly unauthorized addition of words "on demand" held immaterial, since such addition did not alter rights or obligations as between payee and maker. Holliday v. Anderson, 428 S.W.2d 479 (Tex. Civ. App. 1968).

Instruments payable on demand include those in which no time for payment is stated. Erickson v. Newell, 183 Neb. 641, 163 N.W.2d 286 (1968).

An instalment form note in which the spaces for the times and amounts of instalments were left blank is a demand note, due and payable immediately, and this is true irrespective of whether the note is negotiable. Master Homecraft Co. v. Zimmerman, 208 Pa. Super. 401, 222 A.2d 440 (1966).

The absence of a specific maturity date is not a fatal defect. Master Homecraft Co. v. Zimmerman, 208 Pa. Super. 401, 222 A.2d 440 (1966).

The fact that a note set out no date of maturity did not constitute grounds for striking a judgment entered thereon, because under this section a note in which no time for payment is stated is payable on demand. Liberty Aluminum Prods. Co. v. Cortis, 14 Pa. D. & C.2d 624 (1958).

14. Instrument not payable on demand.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App. 565, 222 S.E.2d 126 (1975).

Instrument made payable "at the earliest possible time" was not payable at definite time, nor was phrase "at the earliest possible time" equivalent to no time for payment being stated in instrument; hence, it was not negotiable demand note. Williams v. Cooper, 504 S.W.2d 564 (Tex. Civ. App. 1973).

15. Payable on demand.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. Barton v. Scott Hudgens Realty & Mtg., Inc., 136 Ga. App. 565, 222 S.E.2d 126 (1975).

16. Acceleration clause.

Acceleration clauses premised on default in payment are enforceable under UCC § 3-109(1)(c). Accordingly, where a suit is based only on a note and the creditor does not bring an action to foreclose on the security for the note, such as a deed of trust, the acceleration clause in the note is enforceable, and the debtor has no statutory or equitable right to cure the money default in order to prevent his equitable interest in the collateral (the land) from being jeopardized. Smith v. Certified Realty Corp., 41 Colo. App. 170, 585 P.2d 293 (1978), aff'd, 198 Colo. 222, 597 P.2d 1043 (1979).

Note was negotiable notwithstanding it contained acceleration clause and clause confessing judgment on instrument if not paid when due, since UCC §§ 3-109 and 3-112(d), respectively, authorize such clauses. Broadway Mgt. Corp. v. Briggs, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

17. Post dated check.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son, endorsement modified check by providing for acceleration of time of payment, as authorized by UCC § 3-109(1)(c), and for direct payment by drawer's estate. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

RESEARCH REFERENCES

ALR. When is instrument "payable on demand or at a definite time" as required to constitute negotiable instrument under §§ 3-104(a)(2), 3-108(a), (b) of Uniform Commercial Code. 71 A.L.R.5th 443.

Am Jur. 29 Am. Jur. Proof of Facts 2d 83, Sufficiency of Debtor's Direction as to Application of Payment.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to Section 75-3-205(a). An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to Section 75-3-205(b).

SOURCES: Former § 75-3-109: Codes, 1942, § 41A:3-109; Laws, 1966, ch. 316, § 3-109; Laws, 1992, ch. 420, § 9, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. Negotiable instrument.
2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-110.

11. In general.

III. DECISIONS UNDER FORMER UCC § 75-3-111.

12. In general.

IV. DECISIONS UNDER FORMER UCC § 75-3-805.

13. In general.

V. DECISIONS UNDER FORMER STATUTES.

14. In general.

I. DECISIONS UNDER CURRENT LAW.

1. Negotiable instrument.

Promissory notes were not negotiable instruments and, thus, not subject to a six-year statute of limitations, where they did not contain the language "payable to the order of" or were not made payable to an identified payee or order. Whitaker v. Limeco Corp., 32 So. 3d 429 (Miss. 2010).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-110.

11. In general.

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate's conservatorship. Great S. Nat'l Bank v. Minter, 590 So. 2d 129 (Miss. 1991).

Certificate of deposit which was not payable to order or to bearer, but was payable only on return of instrument properly indorsed, was not negotiable instrument under UCC § 3-104(1)(d) and § 3-110(2). Kaw Valley State Bank & Trust v. Commercial Bank of Liberty, 567 S.W.2d 710 (App. 1978).

Bank was payee of checks made payable to "Pittsburgh National Bank Carpenters Contribution Account" under UCC § 3-117(c), and trustees of money in account named were not payees under UCC § 3-110(1)(e), where, inter alia, agreement which established account clearly created creditor-debtor relationship between trustees of account funds and bank, as depository of trust funds. West Penn Admin., Inc. v. Union Nat'l Bank, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Draft payable to two named payees without addition of words "or order" or any similar words of negotiability was not negotiable instrument within meaning of UCC. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Postal money order resembles negotiable instrument in many but not all respects. See United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

III. DECISIONS UNDER FORMER UCC § 75-3-111.

12. In general.

Judgment by confession entered pursuant to clause in negotiable instrument payable "to the order of Three Thousand Four Hundred Ninety Eight and 45/100 ________ Dollars" was improper; note was not bearer paper within meaning of UCC § 3-111, and holder could not be determined on face of instrument. Broadway Mgt. Corp. v. Briggs, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

If an instrument is made payable to an existing person not intended to have any interest in it, and such fact was known to the person making it so payable or known to his employee, the Legislature intended to make such an instrument bearer paper, thereby relieving a drawee or any endorser from the resulting loss and imposing the loss resulting from actions of a dishonest employee on the drawer-employer. Phoenix Die Casting Co. v. Manufacturers & Traders Trust Co., 50 Misc. 2d 152 (1966).

IV. DECISIONS UNDER FORMER UCC § 75-3-805.

13. In general.

Execution of guarantee was not Code transaction; guarantee was not "transaction ... which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. EAC Credit Corp. v. King, 507 F.2d 1232 (5th Cir. 1975).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104; since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. Jones v. United Sav. & Loan Ass'n, 515 S.W.2d 869 (Mo. Ct. App. 1974).

Instruments not payable to order or bearer were non-negotiable in sense that there could be no holder in due course thereof; however, under Code § 3-805 and official comment thereto, such instruments are treated as negotiable in other respects and are referred to as checks;

being checks within Code, such instruments can be subject of crime of larceny by check. Faulkner v. State, 445 P.2d 815 (Alaska 1968).

V. DECISIONS UNDER FORMER STATUTES.

14. In general.

Purchaser of trade acceptances for cash consideration before due dates without notice of infirmities or defects in instruments held "holder for value without notice," notwithstanding certificates were executed in favor of corporation after it had resolved to change its name to that used as payee in certificates, but before corporation had filed its amended charter. Betlyn Sec. Corp. v. Bates, 177 Miss. 41, 170 So. 301 (1936).

Maker, by executing trade acceptances, admitted existence of corporate payee, and its capacity to indorse paper, and could not defeat liability on ground that amended charter changing name of corporation to that used in trade acceptances was not filed until four days after execution of acceptances. Betlyn Sec. Corp. v. Bates, 177 Miss. 41, 170 So. 301 (1936).

Notes must be payable to order or bearer, and, when payable to order, payee must be named. Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

Payment of negotiable instrument to person not in possession is at payer's risk. Sivley v. Williamson, 112 Miss. 276, 72 So. 1008 (1916).

Note payable to bearer is negotiable instrument. Sivley v. Williamson, 112 Miss. 276, 72 So. 1008 (1916).

RESEARCH REFERENCES

ALR. When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-104(a)(1) and 3-109. 77 A.L.R.5th 523.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

§ 75-3-110. Identification of person to whom instrument is payable.

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one (1) person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the

named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(i) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) A person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to two (2) or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two (2) or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two (2) or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

SOURCES: Former § 75-3-110: Codes, 1942, § 41A:3-110; Laws, 1966, ch. 316, § 3-110; Laws, 1992, ch. 420, § 10, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

Miss. Code Ann. § 75-3-110 does not address the obligations of a bank in determining what to do with a check or other negotiable instrument made out to a payee in trust; therefore, a trial court did not err by determining that a bank was not negligent by failing to intervene in a fraud perpetrated by the wiring of funds from a trust account where the bank had no actual knowledge of the fraud. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate's conservatorship. Great S. Nat'l Bank v. Minter, 590 So. 2d 129 (Miss. 1991).

Under UCC § 3-117(3), providing that instrument made payable to named person with additional words describing him is payable to payee unconditionally and additional words have no effect on subsequent parties, check payable to "Shores Corporation of Miami Escrow Acct. for

Unit 401D Building C B/O Pablo Goldszmidt," which was indorsed "For deposit only, Shores Corporation of Miami," followed by deposit account number, was validly negotiated instrument, and any subsequent party dealing with it could disregard payee's description and treat instrument as payable unconditionally to payee. Pan Am. Bank v. Goldszmidt, 364 So. 2d 505 (Fla. App. 1978), cert. denied, 373 So. 2d 458 (Fla. 1979).

Cashier's check payable to "Shores Corporation of Miami, Escrow Acct. for Unit 301D Building C B/O Ernesto Yanco," which was indorsed "For Deposit Only, Shores Corporation of Miami," followed by deposit account number, was valid and effective under UCC § 3-117(3), which provides that an instrument made payable to named person with additional words describing him is payable to payee unconditionally and additional words are without effect on subsequent parties. Pan Am. Bank v. Yanco, 364 So. 2d 508 (Fla. Dist. Ct. App. 3d Dist. 1978).

In action against bank for alleged negligence in cashing cashier's check issued against account in another bank into which plaintiff's funds had wrongfully been deposited, where evidence showed that such check was made payable to "Emil Haliewicz, Swiss Baco Skyline Logging, Inc."; that "Emil Haliewicz" was name of alleged converter of plaintiff's funds and "Swiss Baco Skyline Logging, Inc." was plaintiff's corporate designation; and that such check had been indorsed by Haliewicz by printing "Swiss Baco Skyline Logg. Inc." on back of instrument and signing his name below such printed words, summary judgment in favor of defendant bank would be affirmed because (1) designation of payee as "Emil Haliewicz, Swiss Baco Skyline Logging, Inc." did not constitute joint-payee language under UCC § 3-116; (2) under facts of case, check was payable under UCC § 3-117(c) to "Emil Haliewicz" conditionally; and (3) plaintiff "Swiss Baco Skyline Logging, Inc.," not being a named payee of such check, had no protectable interest therein. Swiss Baco Skyline Logging, Inc. v. Haliewicz, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Bank was payee of checks made payable to "Pittsburgh National Bank Carpenters Contribution Account" under UCC § 3-117(c), and trustees of money in account named were not payees under UCC § 3-110(1)(e), where, inter alia, agreement which established account clearly created creditor-debtor relationship between trustees of account funds and bank, as depository of trust funds. West Penn Admin., Inc. v. Union Nat'l Bank, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Where a promissory note is made payable to one named therein as attorney for plaintiffs but not endorsed to them by the attorney, plaintiffs may enforce payment as holders of the note. Bennett v. Cannon, 114 Ga. App. 479, 151 S.E.2d 828 (1966).

§ 75-3-111. Place of payment.

Except as otherwise provided for items in Chapter 4, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one (1) place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

SOURCES: Former § 75-3-111: Codes, 1942, § 41A:3-111; Laws, 1966, ch. 316, § 3-111; Laws, 1992, ch. 420, § 11, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-120, 75-3-121.

11. Instruments "payable through" bank.
12. Instruments payable at bank.

III. DECISIONS UNDER FORMER STATUTES.

13. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-120, 75-3-121.

11. Instruments "payable through" bank.

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. GMAC v. General Accident Fire & Life Assurance Corp., 67 A.D.2d 316 (4th Dep't 1979).

Under New Mexico UCC § 3-120 and § 3-121, to make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, as by saying "payable through" on some attached document, such as a collection letter, that accompanies presentment of the draft. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's payees was forged. Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co., 514 S.W.2d 860 (Mo. Ct. App. 1974).

In action against drawer to recover on draft which provided, before space for payee's name, "at sight when approved pay to order of," "at sight" was equivalent to being payable on demand under UCC § 3-108 and where draft, which was payable through bank, did not authorize bank to make payment under UCC § 3-120, approval referred to in quoted phrase was interpreted to require approval by drawer by insertion of authorized signature rather than approval of bank through which draft was made payable. Oneida Nat'l Bank & Trust Co. v. Allstate Ins. Co., 76 Misc. 2d 1062 (1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, (2) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Conviction for possession of blank check with intent to defraud was reversed where blank instrument possessed by defendant, stating that it was "payable through" designated bank, did not authorize bank to pay instrument out of drawer's account under UCC § 3-120; instruments possessed by defendant were therefore not checks as defined by UCC § 3-104(2)(b). People v. Burke, 38 Cal. App. 3d 708 (1st Dist. 1974).

Bank which failed to inquire as to legality of copayee's signature on draft, treated draft as though it was negotiable bank check, and paid instrument although draft stated on its face "payable through" particular branch bank, failed to deal with this draft in accordance with reasonable commercial standards practiced in banking business and, therefore, had failed to establish defense to conversion under UCC § 3-419(3). Montgomery v. First Nat'l Bank, 265 Or. 55, 508 P.2d 428 (1973).

Where check was "payable through" bank, payee could not recover from bank on unauthorized endorsement, since bank was collecting bank within UCC § 3-120, and since UCC § 3-419(3) makes it clear that collecting banks bear no liability to the true owner of a draft or check, except for those proceeds which may remain in possession of said bank. Messeroff v. Kantor, 261 So. 2d 553 (Fla. App. 1972).

The fact that a draft is made payable through a bank does not affect the obligation of the drawee to make payment to the payee or other proper holder. Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

When an item is payable through a bank, or under the law, and "at" item is deemed so payable, the bank is merely a collecting bank and not a payor bank. Phelan v. University Nat'l Bank, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

12. Instruments payable at bank.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) $________," and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee-and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)-because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. Horney v. Covington County Bank, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Under New Mexico UCC § 3-120 and § 3-121, to make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, as by saying "payable through" on some attached document, such as a collection letter, that accompanies presentment of the draft. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Bank was not "payor bank," as defined in UCC § 4-105(b), with respect to sight drafts which were drawn on buyer of meat and which were sent to bank by seller accompanied by invoices for meat, although drafts stated they were payable at bank, where there were no funds of buyer specifically deposited to seller's credit out of which seller had right to direct bank to make payment. Whitehall Packing Co. v. First Nat'l City Bank, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Pointing out it was not necessary to allege presentment and dishonor in the complaint, the court held the failure to give notice of the dishonor of a note discharged the drawer only if the failure to present the note caused a loss because of the insolvency of the bank at which it was payable, and in that event the loss became a matter of defense to be pleaded in the answer with a tender of assignment of the defendant's rights against the bank. County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors, 56 Misc. 2d 832 (1968).

A note stated to be payable at a bank is the equivalent of a draft drawn on the bank, and the bank is not only authorized but ordered to make payment. Goldman v. Goldman, 48 Misc. 2d 985 (1966).

III. DECISIONS UNDER FORMER STATUTES.

13. In general.

Presentment of note elsewhere than at bank, where payable, is insufficient to hold accomodation indorser. Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927).

§ 75-3-112. Interest.

(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

SOURCES: Former § 75-3-112: Codes, 1942, § 41A:3-112; Laws, 1966, ch. 316, § 3-112; Laws, 1992, ch. 420, § 12, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-106.

11. In general.
12. Unconditional promises.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-106.

11. In general.

In action to recover on unpaid promissory notes secured by mortgage on realty, provision in both notes and mortgage that debtor agreed to pay reasonable attorney's fees arising from default was unenforceable on public policy grounds under well-established rule of Kentucky case law; and such rule was not changed by Kentucky version of UCC § 3-106(1)(e), under which sum payable is "sum certain," even though it is to be paid with costs of collection, or attorney's fee not exceeding 15 percent of amount owing, or $500, whichever is smaller, since such statute means only that attorney's fee greater than that allowed by the statute would render instrument indefinite, and therefore nonnegotiable, for failure to contain sum certain. Nor was such provision in notes and mortgage rendered enforceable by UCC § 9-504(1)(a), dealing with secured party's right to dispose of collateral and apply proceeds to, among other things, "reasonable attorney's fees" incurred by secured party, since UCC § 9-504(1)(a) applies only to personalty that is used as collateral, and in present case collateral consisted of realty. (where court expressly declined to determine what phrase "not prohibited by law" in UCC § 9-504(1)(a) might mean in light of Kentucky case law) Mammoth Cave Prod. Credit Ass'n v. Geralds, 551 S.W.2d 5 (Ky. Ct. App. 1977).

In Vermont, it is accepted practice that negotiable instruments may provide for charging the maker with the costs of collection, including attorney's fees. Young v. Northern Terms., Inc., 130 Vt. 258, 290 A.2d 186 (1972).

Provision for a reasonable attorney's fee contained in a promissory note is enforceable. Section 402 of the Personal Property Law as amended July 1, 1967, by the addition of ¶ 6-a (Laws of 1967, Ch 731, §§ 1, 2) is limited to instalment sales contracts. National Bank of N. Am. v. Around the Clock Truck Serv., Inc., 58 Misc. 2d 660 (1968).

A provision in commercial paper for the payment of costs and expenses if "legal proceedings be instituted" is to be interpreted according to general contract law principles as nothing in the Code displaces such principles, and is to be interpreted as requiring that a court action be commenced. Bryant v. Bowles, 108 N.H. 315, 234 A.2d 534 (1967).

The Uniform Commercial Code effects no change in local law with respect to the validity of the provisions of an instrument for attorneys' fees. First Sav. & Loan Ass'n v. Heldman, 79 N.J. Super. 65, 190 A.2d 400 (1963).

Subsection (e) of the instant section was referred to as to notes delivered beginning Oct. 1, 1958, the effective date of the Massachusetts Uniform Commercial Code, in Gramatan Nat. Bank & Trust Co. v. Montgomery (1961) 343 Mass 129, 177 NE2d 577, in connection with the proposition that a reasonable attorney's fee may be recovered on an overdue note where the note so provides. Gramatan Nat'l Bank & Trust Co. v. Montgomery, 343 Mass. 129, 177 N.E.2d 577 (1961).

12. Unconditional promises.

In suit by holder of note given for purchase of realty against surety, who was original purchaser of such realty and original maker of note sued on prior to its assumption by third party under novation, court held (1) that note was negotiable under UCC § 3-112(1)(b), even though it was secured by mortgage; (2) that even though defendant surety was original maker of note, fact that he had no right, title, or interest in collateral for note entitled him to protection of UCC § 3-606(1) concerning harmful impairment of note's collateral; (2) that holder of note unreasonably impaired value of its collateral by executing subordination agreement and releasing over 700 acres of land, which was part of collateral, without defendant surety's knowledge; and (4) that under UCC § 3-606(1)(b), defendant was discharged by such impairment from liability on note. Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986).

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except implied guaranty that instruments are genuine, he has good title to them, and he is not aware of any illegality. Home Ins. Co. v. Citizens Bank, 181 Miss. 181, 178 So. 589 (1938).

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

Where chancery court authorized receiver of bank to release first indorser on note, upon payment of certain sum, decree discharging first indorser and holding second indorser, held unauthorized where without second indorser's consent. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

RESEARCH REFERENCES

ALR. Negotiability of instrument providing for variable rate of interest under UCC § 3-106. 69 A.L.R.4th 1127.

Am Jur. 44B Am. Jur. 2d, Interest and Usury §§ 46, 48, 67.

§ 75-3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in Section 75-4-401(c), an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

SOURCES: Former § 75-3-113: Codes, 1942, § 41A:3-113; Laws, 1966, ch. 316, § 3-113; Laws, 1992, ch. 420, § 13, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. Non-negotiable instruments.
2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-114.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1. Non-negotiable instruments.

Even though the provisions of the Uniform Commercial Code did not apply to a non-negotiable certificate of deposit (CD), Miss. Code Ann. § 75-3-113(a) provided persuasive authority in the determination that the backdating of the CD was appropriate; the backdating instructions here did not affect the date of the actual issuance of the CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-114.

11. In general.

Under UCC § 3-122(1)(b), a cause of action on a demand instrument accrues on the date of the instrument, even though no demand is made by the payee (holding that under UCC § 3-114(2), the stated date of demand notes that were antedated determined when notes were payable). Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1) and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

American Express Travellers checks, which party to whom such checks were given as payment for merchandise saw holder sign and countersign, but which holder did not date or make payable to plaintiff and which plaintiff never completed although he had authority to do so, were incomplete and unenforceable as matter of law, since omission of payee's name rendered checks nonnegotiable under UCC § 3-104(1)(d), which requires that any writing to be negotiable instrument must be payable "to order" or "to bearer." (holding, however, that failure to date checks did not affect their negotiability since UCC § 3-114 expressly permits instruments otherwise negotiable to be undated). Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

In action for breach of implied warranty of merchantability; brought against installer of home heating and air conditioning system for damages resulting from failure of condensate removal pump to function properly, jury question was presented on issue whether installer was "merchant" within meaning of UCC § 1-104 and UCC § 2-314; fact that installer testified knowledgeably about workings and installation of condensate pumps and that he had recommended that a particular pump be installed in system, supported inference that he had installed and sold other pumps during his years in heating and air conditioning business, but also supported inference that condensate pump sale in question was only one that he had ever made. Storey v. Day Heating & Air Conditioning Co., 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975).

Where purchasers of trailer park gave vendors' agent check in acceptance of vendors' offer to sell, fact that check was postdated for one week did not make purchaser's acceptance a qualified acceptance. How v. Fulkerson, 22 Ariz. App. 467, 528 P.2d 853 (1974).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

A post-dated check is not invalid because, at time of its issuance, the payee knew that the drawer had insufficient funds in the bank to pay it. Presley v. American Guarantee & Liab. Ins. Co., 237 Miss. 807, 116 So. 2d 410 (1959).

Post-dated instrument is negotiable. Currie-McGraw Co. v. Friedman, 135 Miss. 701, 100 So. 273 (1924).

§ 75-3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

SOURCES: Former § 75-3-114: Codes, 1942, § 41A:3-114; Laws, 1966, ch. 316, § 3-114; Laws, 1992, ch. 420, § 14, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-118.

11. In general.
12. Handwritten, typed and printed terms.
13. Words and figures.
14. Interest provisions.
15. —Date.
16. —Rate.
17. Two or more signers.
18. Extensions.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-118.

11. In general.

In action by payee against guarantors of promissory note, where guaranties sued on expressly provided that each guaranty applied to renewals of note, that payee could change or renew the original credit, and that payee could release any one or more of the guarantors without notice or demand and without affecting guarantors' liability, guarantors were not released or discharged form liability by UCC § 3-118(f) and UCC § 3-606(1)(a), since these sections of the Uniform Commercial Code apply only to negotiable instruments and do not apply to guaranty contracts, which are not negotiable. First Nat'l Bank v. Energy Equities Inc., 91 N.M. 11, 569 P.2d 421 (Ct. App. 1977).

Code § 3-118 simply establishes certain rules of construction which cannot be altered by parol evidence except in action for reformation, but this section in no way attempts to establish comprehensive parol evidence rule for commercial paper. American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 111 R.I. 415, 303 A.2d 121 (1973).

12. Handwritten, typed and printed terms.

Under Code provision that handwritten terms control typewritten and printed terms, handwritten amendment on face of note which provided that note could be renewed once but would be paid at or before second maturity controlled printed provision of note authorizing extensions without notice to or consent of indorsers. Watson v. First Nat'l Bank, 213 Va. 687, 194 S.E.2d 749 (1973).

Rule that handwritten terms control typewritten terms applies only to terms of instrument itself and not to extraneous matter appearing on document; and it was error to instruct jury that handwritten words "stamped in error" appearing next to bank stamp, "Renewed," across face of note were controlling, in absence of evidence as to who made handwritten entry or when it was done. Pueblo Bank & Trust Co. v. McMartin, 31 Colo. App. 546, 506 P.2d 759 (1972).

13. Words and figures.

In action on note, codefendants who signed instrument as comakers were jointly and severally liable thereon under UCC § 3-118(e), which provides that two or more persons who sign as maker and as part of same transaction are jointly and severally liable, even though instrument contains such words as "I promise to pay." Hubert v. Lawson, 146 Ga. App. 698, 247 S.E.2d 223 (1978).

In action on note whose figures indicated amount payable was $19,896.01, but whose words stated amount due was "Nineteen hundred eight hundred ninety-six ________ and 01/100 Dollars", under UCC § 3-118, words were ambiguous and were therefore controlled by figures. Wall v. East Tex. Teachers Credit Union, 526 S.W.2d 148 (Tex. Civ. App. 1975), rev'd, 533 S.W.2d 918 (Tex. 1976).

14. Interest provisions.

Prior chattel mortgagee, after chattel mortgagor's default on loans and mortgagee's sale of collateral at public auction, was not entitled to deduct from sale proceeds amounts denominated "bonus" and "charges," so as to deprive subsequent chattel mortgagee of its rightful share, under UCC § 9-504(1)(c) and (2), of sale's proceeds because (1) such "bonus" and "charges" were actually "interest" on prior mortgagee's loan to debtor within meaning of UCC § 3-118(d), and (2) under New York law, lender was not entitled to collect unearned interest on money loaned in absence of subsequent agreement between lender and debtor. Bostwick-Westbury Corp. v. Commercial Trading Co., 94 Misc. 2d 401 (1978).

Circumstances surrounding execution of note supported conclusion that parties did not intend to create interest-bearing instrument, although note on its face recited that interest was to be paid at rate of 6 percent; trial court was not required to award interest at rate of 5 percent as specified in statute on judgments, pursuant to UCC § 3-118(d), since payees' conduct was inconsistent with contention that there was ambiguity with respect to rate of interest intended by parties at time instrument was created. Mendelson v. Flaxman, 32 Ill. App. 3d 644, 336 N.E.2d 316 (1st Dist. 1975).

Money loaned bears interest without any express agreement. In re Nicolazzo Estate, 414 Pa. 186, 199 A.2d 455 (1964).

15. —Date.

Under (1) UCC § 3-118(d), providing that provision for payment of interest means interest at judgment rate at place of payment from date of instrument, and (2) non-UCC statute providing for allowance of interest on money due under judgment from date of judgment's rendition until satisfaction of judgment by payment, notes which contained provision that in event of default of more than 30 days on any one payment, they should bear interest at six per cent for the year of the delinquency provided for penalty interest at six per cent only for the four-month period of delinquency in making payment and not for one full year from date of default. Willis v. Community Developers, Inc., 563 S.W.2d 104 (Mo. Ct. App. 1978).

Although there was no demand made on maker, interest on note must run from date of instrument, where note provided "with interest". In re Carr Estate, 436 Pa. 47, 258 A.2d 628 (1969).

The code reiterates the prior law that where an instrument does not specify the date of which interest runs, it will run from the date of the instrument. Taylor v. Hamden Hall Sch., Inc., 149 Conn. 545, 182 A.2d 615 (1962).

Subsection (d) of this section has a similar provision to that of § 17(2) of the (Pa.) Negotiable Instruments Law of 1901, which stated that where an instrument provided for the payment of interest, without specifying the date from which the interest was to run, the interest ran from the date of the instrument, and if the instrument was undated, from the issue thereof. Roller v. Jaffe, 387 Pa. 501, 128 A.2d 355 (1957).

16. —Rate.

Where maker of promissory note, on which blank space for amount of interest had been filled in by payee by inserting the number "8," claimed that he had not agreed to pay any interest but did not protest statements showing both principal and interest due on note, trial court's award of interest at legal rate of six per cent was not error in light of (1) failure of parties to agree on specific rate of interest, and (2) trial court's power under UCC § 3-118(d) to charge interest at statutory rate if space in instrument for interest has been left blank. Roberts v. Southern Wood Piedmont Co., 571 F.2d 276 (5th Cir. 1978).

Where a note is stated to be payable "with interest" the rate is the judgment rate. Epstein v. Paskow & Epstein, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

17. Two or more signers.

Cosigners of a note are usually divided into two categories, principals and sureties. If one is principal, he is commonly designated "maker." Under UCC § 3-118(e), a comaker's liability to the payee is joint and several. As between one another, comakers are presumed to be liable in equal amounts. If one comaker pays the entire judgment entered against all comakers, he is entitled to contribution from each comaker in the amount of his aliquot share of the debt. Caldwell v. Stevenson, 567 S.W.2d 278 (Tex. Civ. App. 1978).

In action on note, codefendants who signed instrument as comakers were jointly and severally liable thereon under UCC § 3-118(e), which provides that two or more persons who sign as maker and as part of same transaction are jointly and severally liable, even though instrument contains such words as "I promise to pay." Hubert v. Lawson, 146 Ga. App. 698, 247 S.E.2d 223 (1978).

Although each signer of note is liable to payee for entire amount under UCC § 3-118(e), generally as between two signers, each is liable for one-half of amount of instrument. However, if co-obligors shared unequally in consideration received from note, contribution may be prorated according to benefits each coobligor received (holding that cosigners of note who benefited from consideration from note in proportions of 64% and 36%, respectively, were liable on instrument in similar proportions). Dittberner v. Bell, 558 S.W.2d 527 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

Since accommodation party under UCC § 3-415(2) is liable in capacity in which he signed instrument, note executed by two persons as comakers, which contained nothing to show that one of them actually signed only as accommodation maker, subjected both under UCC § 3-118(e) to joint and several liability on such obligation. Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collateral where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. Beneficial Fin. Co. v. Marshall, 551 P.2d 315 (Okla. Ct. App. 1976).

Where bank made loan on condition that debtor-corporation's officers personally endorse notes and that creditor-corporations guarantee payments, and where endorsements of creditor-corporation preceded endorsements of officers of debtor-corporation, endorsees were not liable in order in which they endorsed under presumption raised by UCC § 3-414(2), but were jointly and severally liable under UCC § 3-118(e) in that creditor-corporations signed in same capacity as accommodation parties and as a part of same transaction. Zapp Nat'l Bank v. Metropolitan Planning & Redevelopment Corp., 308 Minn. 309, 242 N.W.2d 96 (1976).

Under UCC § 3-414, second endorser of note was not liable to first endorser and presumption that endorsers were liable in order in which their signatures appeared on note was not overcome even if both endorsers signed note "as a part of the same transaction" under UCC § 3-118, where there was no agreement by second endorser to be jointly liable with first endorser. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539 (1976), review denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

One who received benefits from proceeds of note was co-signer; she would have been accommodation signer, even though she did receive money or other benefits for use of her name, if she had received no benefits from proceeds of note. Riegler v. Riegler, 244 Ark. 483, 426 S.W.2d 789 (1968).

An obligation signed by husband and wife imposes upon them joint and several liability. Garner v. Tomcavage, 34 Northumb. Legal J. 18 (Pa. 1962).

When two or more persons execute a promissory note, they are jointly and severally liable, under the general rule. Roller v. Jaffe, 387 Pa. 501, 128 A.2d 355 (1957).

18. Extensions.

Two extensions of note, each for same period as note itself, were authorized by UCC § 3-118(f) and were binding on estate of deceased accommodation indorser where note expressly provided that it could be extended from time to time after maturity without notice to any indorsers or sureties. In such case, deceased accommodation indorser is deemed to have consented in advance to such extensions without notice. Bay Nat'l Bank & Trust Co. v. Mason, 349 So. 2d 810 (Fla. App. 1977).

An agreement by the holder of a note to suspend the right to enforce for 113 days, 21 days longer than the period of the original note, was an extension beyond that authorized by UCC § 3-118(f) and when made without the consent of the endorser discharges the endorser under UCC § 3-606(1)(a). Citizens State Bank v. Beermann Bros. Dehy, 188 Neb. 597, 198 N.W.2d 458 (1972).

§ 75-3-115. Incomplete instrument.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c), if an incomplete instrument is an instrument under Section 75-3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under Section 75-3-104, but, after completion, the requirements of Section 75-3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under Section 75-3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

SOURCES: Former § 75-3-115: Codes, 1942, § 41A:3-115; Laws, 1966, ch. 316, § 3-115; Laws, 1992, ch. 420, § 15, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-115.

11. In general.
12. Date of execution.
13. Blanks which do not render instrument incomplete.
14. Authorized or ratified completion.
15. Unauthorized completion, generally.
16. —Particular applications.

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-115.

11. In general.

In Smith v. Franklin Life Ins. Co. (Pa) 29 Leh Co LJ 235, the court quoted § 3-115, in a case involving a receipt and release, in connection with an insurance policy, which had been filled out to accomplish the purpose of the insured. Smith v. Franklin Life Ins. Co., 29 Leh. C.L.J. 235 (Pa).

12. Date of execution.

Parol evidence is not admissible to show that a note was not executed on the date shown thereon but on a later date and allegedly backdated to the date of the original transaction. Epstein v. Paskow & Epstein, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

Where, after check was signed, printed date of "195" was completed and altered by handwritten "1964", bank properly cashed check, relying on presumption of Code § 3-114(3) that date is correct and on presumption of Code § 3-118(b) that handwritten terms control printed terms. Newman v. Manufacturers Nat'l Bank, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

13. Blanks which do not render instrument incomplete.

In action by holder of note fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108. Gill v. Commonwealth Nat'l Bank, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

14. Authorized or ratified completion.

Where makers signed printed note form, leaving blank spaces for date, amount of interest, and duration of note, and where payee later filled in blank spaces, testimony by makers that they did not expressly give payee authority to fill in blanks did not overcome presumption that payee had authority to complete blanks with respect to date and prematurity interest; UCC § 3-115 provides that burden of establishing that any completion is unauthorized is on the party asserting lack of authorization, effect of which is to imply that transferee has authority to complete blanks in instrument. Antrim v. McMurrey, 549 S.W.2d 463 (Tex. Civ. App. 1977).

In action against guarantor of 11 notes for balance due thereon, even if guarantor signed notes when they were incomplete, under UCC § 3-115(1), they could be subsequently completed if authority to do so had been given. Such authority was implicit where proceeds of note were accepted by obligor without objection. First Nat'l City Bank v. Cooper, 50 A.D.2d 518 (1st Dep't 1975).

Where decedent signed printed blank check containing words necessary to show that it was intended to become negotiable instrument, i.e., "Pay to the order of ________ ", and check was completed for $3,300 with no material omissions and no ambiguities, under UCC § 3-115(2), burden of showing that amount inserted in proper blanks was not what decedent intended and was beyond amount he authorized was upon his estate; since only evidence offered to show amount intended by decedent was four numerals, "3,300," in handwriting of deceased in blank following printed word "For" in lower left hand corner of check and since there was approximately $6,600 in decedent's checking account at time check was written, there was no evidence sufficient to overcome presumption established by UCC § 3-115(2) and check was, therefore, completed as authorized. Calhoun v. Norris (In re Estate of Norris), 532 P.2d 981 (Colo. Ct. App. 1974).

In action by payee-finance company to recover on note signed in blank by comakers and completed by finance company, note was legally executed and valid under UCC § 3-115 where there was evidence that comakers knew that blank instrument they signed was in fact note and where comakers failed to show that they had not authorized finance company to complete blank note. Charter Fin. Co. v. Henderson, 15 Ill. App. 3d 1065, 305 N.E.2d 338 (5th Dist. 1973), aff'd, 60 Ill. 2d 323, 326 N.E.2d 372 (1975).

Where parties to security agreement indicated their intent that paragraph covering debtor's inventory was to be applicable by including under this printed paragraph typewritten statement, "all petroleum products, tires and other motor vehicle supplies, now owned or after-acquired," secured party's alteration of instrument by insertion of "x" in box prefacing paragraph showing coverage of debtor's inventory was authorized. First Nat'l Bank v. Hull, 189 Neb. 581, 204 N.W.2d 90 (1973).

When a note is delivered to a person with the intention, evidenced by clear circumstances or expression, that he fill in any blanks therein, he becomes an agent for that purpose and binds the principal accordingly. Manufacturers Hanover Trust Co. v. Eisenstadt, 64 Misc. 2d 397 (1970).

The holder of negotiable instruments had the right to complete the blanks in the instrument if it so desired. The indorsement of a guarantee signed with obvious blanks can be enforced in the absence of fraud or lack of authority. Flushing Nat'l Bank v. Brightside Mfg., Inc., 59 Misc. 2d 108 (1969).

Holder has right to complete blanks in negotiable instrument. Flushing Nat'l Bank v. Brightside Mfg., Inc., 59 Misc. 2d 108 (1969).

One signing instrument containing blanks is said to have conferred upon transferee of instrument implied authority to complete instrument in accordance with understanding of parties; incompleteness of instrument is no defense in absence of any allegation that transferee acted in excess of implied authority in completing instrument. Davtian v. Barsamian, 106 R.I. 185, 256 A.2d 510 (1969).

Alteration and completion of note by plaintiff-indorsee were assented to, ratified and confirmed by defendant-indorser so that latter was disqualified from attacking validity of note, where there was credible testimony that, at meeting at which note was signed and indorsed, blanks were deliberately left open, subject to being filled in on terms approved by indorsee, and maker and indorser were informed of those terms and accepted them. Fairfield County Trust Co. v. Steinbrecher, 5 Conn. Cir. Ct. 405, 255 A.2d 144 (1968).

The legal effect of giving an incomplete promissory note to another with the authorization to fill in the blanks is the same as delivering a complete instrument. Davis v. Commonwealth, 399 S.W.2d 711 (Ky. 1965), cert. denied, 385 U.S. 831, 87 S. Ct. 67, 17 L. Ed. 2d 66 (1966).

It is no defense that the negotiable instrument had been signed in blank where it was admitted that as completed, the instrument conformed to the agreement made by the parties, as the Code authorizes the completion of incomplete instruments. Chester Valley Refrigeration Co. v. Altieri, 41 Pa. D. & C.2d 90 (1965).

15. Unauthorized completion, generally.

Where an employer signs his name to a blank check the improper completion of the check by an employee and his conversion of the proceeds of the check constitutes the crime of embezzling money, as against the argument that the blank check was not a negotiable instrument as it did not contain any order or promise to pay money and was not payable to order or bearer. State v. Moreno, 156 Conn. 233, 240 A.2d 871 (1968).

Under the Code an unauthorized completion is treated as an alteration of the instrument and governed by the alteration rule stated in UCC § 3-107. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

16. —Particular applications.

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defendant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

Claim in suit to cancel combination note, security agreement, and disclosure statement, which alleged that amount not agreed on was fraudulently inserted in note signed in blank, raised issue that was primarily controlled by UCC § 3-115, which deals with incomplete instruments, and UCC § 3-407, which deals with alteration of instruments. First Am. Bank v. Bishop, 239 Ga. 809, 239 S.E.2d 19 (1977).

Obligor was not shown to have authorized alteration of place of performance of retail instalment contract, where change was not in connection with authority given in contract to complete blanks, and correction authority was given by contract to plaintiff assignee, who did not make alterations, and not to unidentified person who altered provisions. Commercial Credit Corp. v. Bryant, 490 S.W.2d 644 (Tex. Civ. App. 1973).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months prior to maturity date "as authorized" was premature. Bank of New Effington v. Thompson, 502 P.2d 978 (Colo. Ct. App. 1972).

Where the makers of a note, who were inexperienced in even ordinary business affairs, were induced by a salesman to enter into a home improvement contract supposedly with one business concern but without notice to, or consent of, the makers, and after the signing thereof, the name of the concern with whom makers intended to deal was clipped from one copy of the contract and the name of another concern stamped thereon, and makers innocently signed a property loan application in blank, the makers were entitled to the benefit of the rules governing incomplete instruments and alteration of instruments. Fidelity Trust Co. v. Gardiner, 191 Pa. Super. 17, 155 A.2d 405 (1959).

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

Where buyer of automobile signed conditional sale contract with blank spaces, expecting seller's salesman to fill in the blanks, he thereby made seller his agent so that balance stated in the contract was binding on buyer. Universal Credit Co. v. Moore, 173 Miss. 740, 163 So. 142 (1935).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

§ 75-3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, two (2) or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in Section 75-3-419(f) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

SOURCES: Former § 75-3-116: Codes, 1942, § 41A:3-116; Laws, 1966, ch. 316, § 3-116; Laws, 1992, ch. 420, § 16; Laws, 2010, ch. 506, § 15, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-116.

11. In general; instruments payable in the alternative.
12. Instruments payable jointly.
13. —Parties necessary for suit on instrument.
14. —Liability of bank for payment on single indorsement.

III. DECISIONS UNDER FORMER STATUTES.

15. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-116.

11. In general; instruments payable in the alternative.

Certificate of deposit issued by bank which (1) represented deposit of specified sum by decedent, (2) was payable in the alternative to decedent or to plaintiff-claimant of certificate's proceeds, (3) had not been negotiated to plaintiff in accordance with UCC § 3-116(a), but was still in decedent's possession at time of her death, and (4) contained no reference to survivorship rights, was in decedent's possession as holder in due course and thus was part of her estate when she died (holding that Uniform Commercial Code controls certificates of deposit which comply with UCC § 3-104(2)(c)). Thomas v. Estate of Eubanks, 358 So. 2d 709 (Miss. 1978).

12. Instruments payable jointly.

UCC § 3-605(1)(b) allows the holder of an instrument to discharge a party thereto to the extent of the holder's interest in the instrument. However, under UCC § 3-116(b), the holder cannot discharge all interests under an instrument that is payable, but not in the alternative, to both himself and another party (holding that UCC § 3-605(1)(b) does not prohibit person from discharging his interest in an instrument by a renunciation contained in a properly executed will). Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

Husband and wife held notes as tenants in common where notes were payable to husband and wife and where nothing appeared in instruments evidencing intention to create survivorship. Fehling v. Cantonwine, 522 F.2d 604 (10th Cir. Wyo. 1975).

Note payable to two persons could not be cancelled by one of those persons without authority given by the other. May v. Triangle Oil Co., 96 Idaho 289, 527 P.2d 781 (1974).

Questions of fact precluding summary judgment existed as to whether check proceeds went where intended under UCC § 3-116 where negotiable instrument payable to two payees was cashed bearing the forged endorsement of one of the payees. Sullivan v. Wilton Manors Nat'l Bank, 259 So. 2d 194 (Fla. App. 1972).

Both co-payees must endorse a negotiable instrument payable to both. Sullivan v. Wilton Manors Nat'l Bank, 259 So. 2d 194 (Fla. App. 1972).

Instrument payable to joint payees must be endorsed by all of them. Insurance Co. of N. Am. v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

All joint payees must join not only for negotiation but also for discharge. Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368 (2d Dist. 1967).

Under the Uniform Negotiable Instruments Law, requiring the indorsement of all where there are two or more payees or indorsees, and supplemented by the instant section, it was held that where a check was payable to two persons, the indorsement of both persons was necessary to cash the check or otherwise to transfer it. Gill Equip. Co. v. Freedman, 339 Mass. 303, 158 N.E.2d 863 (1959).

Where a check is made payable to two persons and is turned over to one of the payees upon an understanding that the proceeds were to be used for a particular purpose, the payee who received and indorsed the check is responsible for the proper application of the proceeds, and he may not defend on the ground that he gave the check to the other payee, and that he, the first payee, received no benefit from the check. Gill Equip. Co. v. Freedman, 339 Mass. 303, 158 N.E.2d 863 (1959).

13. —Parties necessary for suit on instrument.

Under UCC § 3-116(a), one of joint payees could enforce payment of note without joining other payee. McDonald v. McDonald, 232 Ga. 190, 205 S.E.2d 850 (1974).

Two payees named in note are each indispensable party in suit by one of them on note, if note does not provide that it is payable to them in the alternative. Hinojosa v. Love, 496 S.W.2d 224 (Tex. Civ. App. 1973).

Individual payee was not indispensable party to action on note made payable to individual and/or company. Lohf v. Warner, 495 P.2d 241 (Colo. Ct. App. 1972).

14. —Liability of bank for payment on single indorsement.

A check made payable to copayees requires the indorsement of both for negotiation (Uniform Commercial Code, § 3-116) and an indorsement by only one of the payees is so obviously inadequate that payment by a drawee bank is a departure from reasonable commercial standards. A drawee bank that makes improper payment of a check may plead the equitable defense of unjust enrichment when sued by the drawer if the proceeds actually reached all the payees designated by the drawer. If one of the payees has received none of the proceeds of the check, the drawee bank is answerable to the drawer for the entire amount of the check as the bank has failed to shield itself from its mistake in paying the amount of the check without a proper indorsement. The fact that a copayee who did not receive payment asserts no interest in the check will not benefit the drawee bank as the intent of the drawer is controlling, even if such intent resulted from mistake induced by some third party, not an agent or employee of the drawer. Middle States Leasing Corp. v. Manufacturers Hanover Trust Co., 62 A.D.2d 273 (1st Dep't 1978).

Where drawee bank, in violation of UCC § 3-116(b), paid check made out to two payees on indorsement of one payee only and nonindorsing copayee received none of check's proceeds, (1) drawee bank was liable to drawer for entire amount of check, and (2) drawee bank could not successfully assert defense of unjust enrichment of drawer without showing that check's proceeds had been received by both payees (also holding that in drawee bank's third-party action against federal reserve bank, additional time for discovery should have been allowed respecting issue as to whether drawee bank's claim for breach of warranty was made within reasonable time under UCC § 4-207(4)). Middle States Leasing Corp. v. Manufacturers Hanover Trust Co., 62 A.D.2d 273 (1st Dep't 1978).

Where check was payable not in the alternative to two payees, bank which paid check on indorsement of one payee only, and which credited entire proceeds of check to account of indorsing payee without other payee's knowledge, was liable in conversion for face amount of check because (1) under UCC § 3-116(b), check could only be negotiated by both payees, and (2) payment of a check on a missing indorsement is equivalent to payment on a forged indorsement, and under UCC § 3-419(1)(c), instrument is converted when it is paid on a forged indorsement (rejecting defense contention that since United States treasury eventually honored check in suit, which was drawn by government agency, such action was evidence of drawer's intent to pay "in the alternative" under UCC § 3-116(a)). Peoples Nat'l Bank v. American Fid. Fire Ins. Co., 39 Md. App. 614, 386 A.2d 1254 (1978).

Under UCC § 3-116(b), unless a check payable to the order of two or more payees is in the alternative, a bank can accept and pay it only on the indorsement of all payees (case involving payment of check, jointly payable to both subcontractor and materialman, without obtaining materialman's indorsement, wherein court also stated that subrogation rights granted by UCC § 4-407(c) to payor bank could not be used to defeat materialman's claim, and that court of appeals correctly held that both collecting and drawee banks were liable to materialman as a matter of law). Trust Co. v. Refrigeration Supplies, Inc., 241 Ga. 406, 246 S.E.2d 282 (1978), on remand, 146 Ga. App. 825, 247 S.E.2d 542 (1978).

In action against bank for alleged negligence in cashing cashier's check issued against account in another bank into which plaintiff's funds had wrongfully been deposited, where evidence showed that such check was made payable to "Emil Haliewicz, Swiss Baco Skyline Logging, Inc."; that "Emil Haliewicz" was name of alleged converter of plaintiff's funds and "Swiss Baco Skyline Logging, Inc." was plaintiff's corporate designation; and that such check had been indorsed by Haliewicz by printing "Swiss Baco Skyline Logg. Inc." on back of instrument and signing his name below such printed words, summary judgment in favor of defendant bank would be affirmed because (1) designation of payee as "Emil Haliewicz, Swiss Baco Skyline Logging, Inc." did not constitute joint-payee language under UCC § 3-116; (2) under facts of case, check was payable under UCC § 3-117(c) to "Emil Haliewicz" unconditionally; and (3) plaintiff "Swiss Baco Skyline Logging, Inc.," not being a named payee of such check, had no protectable interest therein. Swiss Baco Skyline Logging, Inc. v. Haliewicz, 18 Wash. App. 21, 567 P.2d 1141 (1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where draft, made payable to three parties, was paid over forged endorsement of one of the parties, under UCC § 3-116 drawer's debt was not discharged as to party whose endorsement was forged; payment of instrument by drawer-drawee constituted conversion of instrument for which drawer-drawee must respond in damages under UCC § 3-419. Lee v. Skidmore, 49 Ohio App. 2d 347, 361 N.E.2d 499 (1976).

Bank that issued cashiers' check which was purchased by corporation and made payable to it and plaintiff, a third party, was liable to plaintiff where it allowed corporation to return cashiers' check without plaintiff's indorsement and issued two new cashiers' checks payable to corporation only; although bank would have been justified in relying on presumption of continued ownership of check by corporation, absent any unusual circumstances, there were unusual circumstances in present case sufficient to raise duty of inquiry where, inter alia, bank refused to issue original $25,000 cashiers' check to corporation as drawer-purchaser until plaintiff's earnest money check for $25,000, which was deposited in corporation's account, had cleared, corporation at that time had balance of only $13,000 in its account, and, when plaintiff's $25,000 check cleared, bank issued $25,000 cashiers' check payable to plaintiff and corporation; where president of corporation returned cashiers' check for $25,000 about one month later, notified bank that it had not been used for intended purpose, and requested two new cashiers' checks (one for $15,000 and one for $10,000) payable only to corporation, and, at bank's request, president wrote "not used for purpose issued" on reverse side of $25,000 cashiers' check; where plaintiff, a joint payee, did not indorse cashiers' check for $25,000; and where bank failed to make any inquiry and issued $15,000 and $10,000 cashiers' checks payable to corporation only, as requested, and thereby made possible conversion by corporation of $25,000 of plaintiff's money. Gillespie v. Riley Mgt. Corp., 59 Ill. 2d 211, 319 N.E.2d 753 (1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

III. DECISIONS UNDER FORMER STATUTES.

15. In general.

The collecting bank which honored, and the drawee bank which paid, a check payable to two payees but only indorsed by one, were both liable in tort for conversion provided loss or injury resulted from such acts which violated this section. Kaplan v. Deposit Guar. Nat'l Bank, 192 So. 2d 391 (Miss. 1966).

Payee indorsers of notes held liable to purchaser, notwithstanding administrator of joint payee was not expressly authorized to indorse notes by foreign court which had jurisdiction of administration of estate, where purchaser paid payee's interest in proceeds of notes to payee's heirs who assigned to purchaser their interest in notes and sale of notes and disbursement of proceeds was approved by administration court, especially where neither such court nor payee's heirs had repudiated administrator's indorsement. Weston v. Merchants' Bank & Trust Co., 173 Miss. 34, 161 So. 145 (1935).

RESEARCH REFERENCES

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

§ 75-3-117. Other agreements affecting instrument.

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

SOURCES: Former § 75-3-117: Codes, 1942, § 41A:3-117; Laws, 1966, ch. 316, § 3-117; Laws, 1992, ch. 420, § 17, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

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I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general; liability of guarantor or payment.

Liability of guarantor becomes indistinguishable from that of comaker since guarantor waives presentment, notice of dishonor, and protest and demand upon maker of promissory note. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

Effect of assumption agreement is to make parties thereto liable on promissory note. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

Parties who sign guaranty agreement are sureties on promissory note because of that agreement. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

Cosigners of a note are usually divided into two categories, principals and sureties. If one is a surety, he is usually termed an "accommodation party" (see UCC § 3-415(1)) or a "guarantor" (see UCC § 3-416). A surety (accommodation party) is primarily liable with the principal (maker) to the payee of a note because he lends his name to the note as security (see UCC § 3-415(2)). However, the rights and obligations of a surety are different from those of a principal, one important difference being that if the surety pays the judgment, he stands in the shoes of the creditor and may sue on the judgment itself. In such a case, he has the burden of proving suretyship, and his burden is onerous, since it is presumed that one signs as a comaker unless the suretyship relation between the cosigners appears on the face of the note (holding that plaintiff, who alleged that he was merely surety on note, failed to rebut presumption that he had signed as comaker, since he did not make note part of his summary judgment proof and court thus could not ascertain whether surety relationship alleged actually appeared on face of note). Caldwell v. Stevenson, 567 S.W.2d 278 (Tex. Civ. App. 1978).

No notice of default must be given guarantor of unsecured demand note; guarantor became liable as original obligor pursuant to UCC § 3-416. Knick v. Green, 545 S.W.2d 269 (Tex. Civ. App. 1976), ref. n.r.e (June 29, 1977).

Under UCC § 3-416(1) payee of note guaranteed by defendant was not required to proceed against maker of note before bringing action against defendant. Brown Univ. v. Laudati, 113 R.I. 299, 320 A.2d 609 (1974).

Language of guarantee "to be responsible for payment of the sums owed pursuant to such loan," was clear and unambiguous in that, by its terms and as matter of law, guarantors were guarantors of payment and not collection; and holder of note could sue them without resort to any other party. Cusick v. Ifshin, 70 Misc. 2d 564 (1972), aff'd, 73 Misc. 2d 127, 341 N.Y.S.2d 280 (1973).

Under New Jersey UCC, guaranty contract indorsed on reverse side of notes obligated guarantor to pay for attorney's fees and to be bound by acceleration clause as provided for in note. Warner-Lambert Pharmaceutical Co. v. Sylk, 471 F.2d 1137 (3d Cir. Pa. 1972).

Note sued upon was signed by party as "guarantor"; held, such party must pay note according to its tenor without resort by holder to any other party as condition precedent. Sadler v. Kay, 120 Ga. App. 758, 172 S.E.2d 202 (1969).

Under the Code, a guaranty of payment is in effect the same as a suretyship undertaking and the guarantor may therefor be sued jointly with the primary party without at first making an attempt to recover from such party. Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393 (N.D. Ga. 1967).

When corporate officers guarantee payment of a corporate note, they become primarily liable for the payment of the note to the same extent as the corporation. Reynolds v. Service Loan & Fin. Co., 116 Ga. App. 740, 158 S.E.2d 309 (1967).

The Code makes no distinction with respect to a guarantee of payment in terms of whether the debtor is an individual or a corporation. Reynolds v. Service Loan & Fin. Co., 116 Ga. App. 740, 158 S.E.2d 309 (1967).

12. —Similarity to co-maker.

A guarantor of a note, as an accommodation maker, was liable for the entire balance of the note to an accommodation endorser who paid the note. Comfort Eng'g Co. v. Kinsey, 523 So. 2d 1019 (Miss. 1988).

Liability of guarantor of note was same as comaker, and payee had no duty after default by maker to resort either to collateral or to any other party before seeking payment from guarantors. Rassette v. Jacobson, 39 Mich. App. 172, 197 N.W.2d 330 (1972).

Guarantor's liability is the same as that of a comaker. Rassette v. Jacobson, 39 Mich. App. 172, 197 N.W.2d 330 (1972).

Liability of guarantors of "payment" of loan is indistinguishable from that of a comaker. Etelson v. Suburban Trust Co., 263 Md. 376, 283 A.2d 408 (1971).

13. Liability for guarantee of collection.

Under UCC § 3-416, claim must be prosecuted to judgment and execution returned unsatisfied or maker of note found insolvent in order for there to be recovery on guarantee of collection and not of payment. Floor v. Melvin, 5 Ill. App. 3d 463, 283 N.E.2d 303 (3d Dist. 1972).

14. Limited guaranty.

Under guaranty to bank, guaranteeing only obligations on which debtor was primarily liable, guarantor was not liable, under UCC § 3-416 [3], for obligation to bank of third party, on which debtor was secondarily liable as guarantor. Trego WaKeeney State Bank v. Maier, 214 Kan. 169, 519 P.2d 743 (1974).

15. Words creating guaranty.

Where parent corporation formed wholly-owned subsidiary solely to acquire assets of defendant's business, purchase agreement provision that parent corporation agreed "to cause buyer to purchase and to accept transfer" did not create guaranty under UCC § 3-416. Gladding Corp. v. Register, 293 So. 2d 729 (Fla. App.

1974), cert. discharged, 322 So. 2d 911 (Fla. 1975).

16. Practice and procedure.

In action under UCC § 3-416(1) against guarantor of note because of maker's alleged failure to pay two interest installments on time, where plaintiff demands summary judgment and defendant contends that plaintiff's declaration of default and demand for full payment under acceleration clause is premature because said plaintiff at time held $100,000 fund belonging to debtor, the trial court, in it's discretion, may deny said summary judgment where there is a reasonable possibility that recovery by plaintiff will be mitigated or offset by defendant's prevailing on counterclaim. Mock v. Canterbury Realty Co., 152 Ga. App. 872, 264 S.E.2d 489 (1980).

Under both UCC § 3-416(1), dealing with payment by guarantor of instrument under contract of guaranty, and terms of actual contract under which guarantors of notes declared that their guaranty obligations were absolute and unconditional and that creditor could bring suit against any guarantor for payment of obligations of principal without regard to whether creditor had brought suit against principal or any other party primarily or secondarily liable on principal's obligations, trial court did not err in granting summary judgment in favor of creditor without joining principal as indispensable party defendant. Johnson v. First Nat'l Bank, 143 Ga. App. 384, 238 S.E.2d 747 (1977).

In action to enforce guarantor's liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, inter alia, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be defendant's signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys' fees. Wolfe v. Madison Nat'l Bank, 30 Md. App. 525, 352 A.2d 914 (1976).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. Jamaica Tobacco & Sales Corp. v. Ortner, 70 Misc. 2d 388 (1972).

17. —Defenses; usury.

Guarantor is not party to principal obligation and therefore defense of usury is not available to guarantors. A.J. Armstrong Co. v. Lincoln Fin. & Thrift, Inc., 291 F. Supp. 1008 (E.D. Tenn. 1968).

Where the original corporate debtor may not raise the defense of usury, that defense may not be raised by secondary parties who have guaranteed payment of the corporate note and have thus become primarily liable for its payment. Reynolds v. Service Loan & Fin. Co., 116 Ga. App. 740, 158 S.E.2d 309 (1967).

III. DECISIONS UNDER FORMER UCC § 75-3-119.

18. In general.

UCC § 3-119(1) incorporates into the law of negotiable instruments the ordinary rule that writings contemporaneously executed as a part of the same transaction are to be read together as a single agreement. As between the immediate parties, a negotiable instrument is merely a contract or part of an overall contractual transaction, and any defense to the underlying obligation is also a defense to the negotiable instrument as long as the instrument remains in the hands of one who is not a holder in due course (holding that where indemnity agreement in bail bond case was legally unenforceable against party who signed it, promissory note signed by such party in conjunction with indemnity agreement also was unenforceable). Perry v. Cain, 581 P.2d 891 (Okla. 1978).

UCC § 3-119 applies to negotiable instruments the ordinary rule that writings executed as part of the same transaction are to read together as a single agreement. As between the immediate parties, a negotiable instrument is merely a contract and is no exception to the principle that courts will look to the entire contract in writing. Accordingly, a note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant term in the separate agreement. However, the phrase "may be modified or affected" in UCC § 3-119(1) does not mean that the separate agreement must necessarily be given effect; there is still room for construction of the separate agreement as not being intended to affect the negotiable instrument at all, or as being intended to affect it for a limited purpose only, such as foreclosure or other realization of collateral. And if there is outright contradiction between the two, as where a note is for $1,000 but the accompanying mortgage recites that it is for $2,000, the note may be held to stand on its own feet and not to be affected by the contradiction. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

19. Evidence; "same transaction."

Where buy-sell agreement for purchase of dress shop stated that balance was to be financed through SBA participation loan, where buyer did not have loan at time of closing and seller agreed to take note in lieu of cash, and where written act of sale executed at same time stated that sale was made pursuant to agreement executed previously by vendors and vendee, parol testimony of parties concerning their intention was admissible pursuant to UCC § 3-119(1), but buyer-maker did not sustain burden of proof that payment of note was conditioned on his obtaining SBA loan. Demaio v. Theriot, 343 So. 2d 1143 (La. App. 1977), writ denied, 346 So. 2d 218 (La. 1977).

Evidence may be offered by defendant under UCC § 3-119(1) to show that note sued on had been modified by prior written agreement between parties that was executed as part of same transaction, so as to cause note not to be due at time of suit. However, where such evidence does not demand finding that note was thus modified, trial court does not commit error in finding that note was overdue and unpaid. Eason v. Berger & Co., 143 Ga. App. 482, 238 S.E.2d 593 (1977).

Various instruments pertaining to same transaction, i.e., obtaining permanent financing for land development, although executed at different times and not expressly referring to each other, would be read together as one contract, notwithstanding claim that such documents were inadmissible on ground that they contradicted "no pre-payment" clause in note and thus violated parol evidence rule, where promissory note was not entire contract between parties. Pendleton Green Assocs. v. Anchor Sav. Bank, 520 S.W.2d 579 (Tex. Civ. App. 1975).

Pursuant to UCC § 3-119, defendant in action on cognovit note which he had executed could have presented evidence indicating that note had been modified by real estate contract between defendant and plaintiff; however, reference to "earnest money" on face of note did not itself modify instrument. Robbins v. Avara, 28 Ill. App. 3d 292, 328 N.E.2d 95 (1st Dist. 1975).

In action by bank on promissory note in which defendant showed he was accommodation maker under UCC § 3-415, all written agreements executed at same time as part of same transaction were admissible in action between original parties under UCC § 3-119. Berger v. Mercantile Nat'l Bank, 231 Ga. 680, 203 S.E.2d 479 (1974).

Code § 3-119 applies to negotiable instruments general rule that writings executed as part of same transaction are to be read together as single agreement; and standby agreement executed on August 3 by buyers, sellers, and Small Business Administration and promissory note executed on September 10 by buyers payable to sellers could be said to have arisen out of same transaction, since both were executed as part of plan for financing sale of children's clothing store and standby agreement was intended to limit right of sellers to assert claim for balance due on purchase price still owing after September 10, until written consent of SBA had been obtained or until SBA loan had been fully paid. Sanden v. Hanson, 201 N.W.2d 404 (N.D. 1972).

Renewal of original note was basis of suit by bank for sum due; earlier contract regarding creation of obligated corporate entity and covering letter pertaining to security agreement executed simultaneously with original note were both part of same transaction and were admissible under parol evidence rule. Merchants Nat'l Bank & Trust Co. v. Professional Men's Ass'n, 409 F.2d 600 (5th Cir. Tex. 1969), cert. denied, 396 U.S. 1009, 90 S. Ct. 567, 24 L. Ed. 2d 501 (1970).

20. Other writings read with instrument.

Check bearing unconditional language of release, accompanied by letter of transmittal which set forth basis of dispute between parties, along with appropriate cautionary language that deposit of check constituted acceptance of settlement offer, were to be read together under provisions of UCC § 3-119(1) so that deposit of check constituted accord and satisfaction between parties regardless of any alteration or disclaimer added to check by payee. A.G. King Tree Surgeons v. Deeb, 140 N.J. Super. 346, 356 A.2d 87 (1976).

Maker of promissory note was not liable to transferee of note where note was executed in conjunction with instrument providing that first payment was to be made out of sale of paint (which never materialized) and where transferee, who did not qualify as innocent purchaser for value without notice, was bound by terms of accompanying agreement under UCC § 3-119. Texas State Bank v. Sharp, 506 S.W.2d 761 (Tex. Civ. App. 1974), ref. n.r.e (July 10, 1974).

In determining whether a mortgage note provided for payment of a usurious rate of interest, it should be construed in conjunction with a building contract executed at the same time as the note and as a part of the same transaction. Guaranty Fin. Corp. v. Harden, 242 Ark. 779, 416 S.W.2d 287 (1967).

Where promissory note merely recites installments due but does not indicate how much is interest, it is proper to interpret the note together with the mortgage executed as part of the same transaction in order to determine what part was interest, where rights of a holder in due course were not involved. Guaranty Fin. Corp. v. Harden, 242 Ark. 779, 416 S.W.2d 287 (1967).

21. —Holder in due course.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

If assignee of lease concerning computers and computer equipment took assignment for value, in good faith and without notice of concurrent agreement that lease, would not be effective if certain acceptable and satisfactory equipment were not delivered, assignee could recover on lease notwithstanding lessor's alleged failure to deliver equipment where lease provided that lessee would not assert against assignee any defenses, counterclaims or offsets which it might have against lessor. National Bank of N. Am. v. DeLuxe Poster Co., 51 A.D.2d 582 (2d Dep't 1976).

Where note and mortgage were executed simultaneously, note provided that all terms of mortgage were thereby made part of note, and terms of mortgage made it patent that mortgagees could look only to mortgage property to recover debt, assignees of portion of mortgage note were not holders in due course and were subject to limitation in mortgage precluding deficiency judgment. Stern v. Itkin Bros., 87 Misc. 2d 538 (1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and

3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

22. Separate agreements.

UCC § 3-119(2) rejects decisions which have carried the rule about reading contemporaneous writings together to the point of holding that a clause in a mortgage affecting a note destroys the negotiability of the note. The negotiability of an instrument is always determined solely by what appears on the face of the instrument itself, and if it is negotiable by itself, a purchaser without notice of a separate writing is in no way affected by such writing. If the instrument itself states that it is subject to or governed by any other agreement, it is not negotiable under Article 3; but if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable. Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where bank's refusal to sign was because it had no ownership interest in corporation but only security interest in corporation's assets; (3) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (4) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, buyer's contention that when bank accepted and cashed cashier's checks it became obligated by terms of sale agreement could not be sustained because (1) clear import of Uniform Commercial Code is that negotiable instruments may not be used by parties to express obligations other than obligation stated in UCC § 3-104(1)(b), namely, unconditional promise to pay sum certain; and (2) since terms of sale agreement with respect to such cashier's checks required only that they be made out for specified amounts and be payable to specified copayees, such checks were not affected or modified under UCC § 3-119(1) by terms of sale agreement, but were completely independent of such agreement. In such case, cashier's checks stood on their express terms, bank's acceptance of such checks did not constitute acceptance of terms of separate sale agreement which bank did not sign, and causes of action arising out of such sale agreement were not available against bank. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Official Comments to UCC § 3-119 make clear that negotiable instruments will not be affected by terms of separate contract in absence of some express term in such contract. And even then, contradictions between a negotiable instrument and such separate contract may be controlled by negotiable instrument itself. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

In action to recover on notes, under UCC §§ 3-119 and 3-601, question of fact existed as to whether parties entered into written contract which relieved defendants of personal liability on notes, or whether parties performed under oral contract to same effect. DiLeo v. Werb, 50 A.D.2d 570 (2d Dep't 1975).

Written agreement by parties to promissory note executed contemporaneously with note in question which merely recited that corporate maker was attempting to develop foreign source of crude oil for import into United States and, for services rendered to corporation, individuals who were payees of note would be entitled to receive fee of 1 per cent per barrel from expected sale of crude oil, standing alone, did not alter or modify promissory note. Texas Export Dev. Corp. v. Schleder, 519 S.W.2d 134 (Tex. Civ. App. 1974).

Negotiability of check is not affected by fact it is drawn in return for creation of debt obligation from payee to drawer which is secured by collateral, nor is such negotiability affected by promise to maintain or protect collateral, and borrower who accepts check representing proceeds of his loan may freely negotiate check as his own property notwithstanding security agreement which secures his obligation to repay. Johnson v. State, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

RESEARCH REFERENCES

ALR. Construction and effect of UCC § 3-416 governing guaranty contracts. 10 A.L.R.4th 897.

§ 75-3-118. Statute of limitations.

(a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

(b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six (6) years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten (10) years.

(c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three (3) years after dishonor of the draft or ten (10) years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three (3) years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six (6) years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six (6) years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six (6) years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

SOURCES: Former § 75-3-118: Codes, 1942, § 41A:3-118; Laws, 1966, ch. 316, § 3-118; Laws, 1992, ch. 420, § 18, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. Generally.
2. Applicability.
3. Conversion.

4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-122.

11. Accrual of cause of action, generally.
12. —Particular cases.

I. DECISIONS UNDER CURRENT LAW.

1. Generally.

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and the creditor never filed collection on the note. Chimento v. Fuller, 965 So. 2d 668 (Miss. 2007).

Because a promise is a note under Title 75, Chapter 3, of the Mississippi Code Annotated, the reference in Miss. Code Ann. § 75-3-118(a) to "a note payable at a definite time" is to a promise payable at a definite time, in other words, a promissory note. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Holder was properly granted summary judgment because its 2005 action to recover funds due under the maker's promissory note, which was dated on September 7, 1999, was timely filed under the six-year statute of limitations in Miss. Code Ann. § 75-3-118(a), and the general three-year limitations period in Miss. Code Ann. § 15-1-49 did not apply. Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. Ct. App. 2007).

Where plaintiff did not file his action to recover funds after defendant's check to him bounced until almost four years after the check was first dishonored, plaintiff's action was barred by the statute of limitations in Miss. Code Ann. § 75-3-118(c). Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

2. Applicability.

Recap statements prepared by lender did not satisfy the definition of a negotiable instrument because first, there was no written document that contained an unconditional promise by the borrowers to pay him; second, with the exception of the checks written by the lender to either one of the borrower's or her husband's furniture company, none of the documents that the lender alleged to comprise a written demand note contained the words "payable to bearer" or "payable to order." Lacking these things, the lender's claims were not claims upon negotiable instruments so as to be governed by the Uniform Commercial Code and covered under the six-year statute of limitations pursuant to Miss. Code Ann. § 75-3-118(b). Morgan v. Stevens, 989 So. 2d 482 (Miss. Ct. App. 2008).

3. Conversion.

Trial court erred in denying a bank's motion for summary judgment on a guardian's claims for conversion of a negotiable instruments and negligence/gross negligence because the claims were filed outside the three-year statute of limitations, the discovery rule was inapplicable to the conversion claim where the guardian conceded that the bank was not involved in an attorney's fraudulent concealment, and the guardian lacked diligence in failing to obtain and review any account statements for more than a year and a half on one account and more than eight years on the other. Peoples Bank of Biloxi v. McAdams, 171 So. 3d 505 (Miss. 2015).

4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-122.

11. Accrual of cause of action, generally.

Under UCC § 3-122(1)(b), a cause of action on a demand instrument accrues on the date of the instrument, even though no demand is made by the payee (holding that under UCC § 3-114(2), the stated date of demand notes that were antedated determined when notes were payable). Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

Rule that loan of money payable on demand creates present debt, and that statute of limitations begins to run against lender from date of loan, is in accord with UCC § 3-122(1)(b). Hopper v. Hemphill, 19 Wash. App. 334, 575 P.2d 746 (1978).

UCC § 3-122, which provides for accrual of interest from date of maturity of commercial paper, prevailed in action on negotiable promissory note over another statute which gave jury discretion to fix time when interest commenced in any action on contract, where other statute stated that it applied "except as otherwise provided in § 3-122 of the Uniform Commercial Code." Schwab v. Norris, 217 Va. 582, 231 S.E.2d 222 (1977).

Statute of limitations on note payable "30 days after demand" began running on making of note, and suit to enforce note was therefore time barred when brought more than six years after note was executed. Environics, Inc. v. Pratt, 50 A.D.2d 552 (1st Dep't 1975).

Demand note was mature and due when issued. Paine-Erie Hosp. Supply, Inc. v. Lincoln First Bank, 82 Misc. 2d 432 (1975).

Under UCC § 3-122, when read in light of § 1-201, all remedies on time instrument fall due at beginning of business day after maturity; thus, bank was not entitled to set off customer's checking accounts towards satisfaction of 30-day promissory note executed by customer and made payable to bank where judgment creditor of customer served writ of execution on bank as garnishee on date that note matured. Bethlehem Acceptance Corp. v. Ed Newman Motor Co., 230 Pa. Super. 441, 331 A.2d 497 (1974).

Having found defendant and third party defendant in effect liable as drawers of unpaid settlement draft, district court could award interest and attorney's fees to plaintiff. Farmers & Merchants Mut. Fire Ins. Co. v. Pulliam, 481 F.2d 670 (10th Cir. Okla. 1973).

On an installment note, the statute of limitations begins to run against each installment on the day following its maturity date. Oklahoma Brick Corp. v. McCall, 497 P.2d 215 (Okla. 1972).

Cause of action ripens day after note matures without payment, since, in computing limitations period, day on which cause of action accrues is to be excluded. Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., 452 F.2d 1346, 147 U.S. App. D.C. 14 (D.C. Cir. 1971), but see, Steorts v. American Airlines, 647 F.2d 194, 207 U.S. App. D.C. 369 (1981).

Cause of action against endorser of promissory note accrues to holders in due course following dishonor of instrument, and holders need not first recover judgment against maker before proceeding against the endorser. D'Andrea v. Feinberg, 45 Misc. 2d 270 (1965).

12. —Particular cases.

Under UCC § 3-122(1)(a), note for $2500 dated October 29, 1952, which was executed on printed form and which contained in addition to printed clauses a separate paragraph stating that it was due on demand from maker's estate at maker's death, did not mature and was not payable until happening of such death and making of such demand, and non-UCC four-year statute of limitations did not begin to run until date of maker's death (where maker died on November 20, 1976, suit was instituted on March 2, 1977, and court stated that mere fact that note was 25 years old did not render it unenforceable). Thigpen v. Thigpen, 563 S.W.2d 868 (Tex. Civ. App. 1978), ref. n.r.e (July 19, 1978).

Party who stipulated to having signed demand note as both "guarantor and endorser" on November 27, 1968, and against whom demand for payment was made on August 15, 1975, was liable on instrument because (1) nothing in New Jersey UCC precluded person from being liable as both an indorser and a guarantor; (2) New Jersey six-year statute of limitations did not bar suit against defendant, since under New Jersey UCC § 3-122(3) cause of action accrued against defendant, as indorser of note, not on date note was executed but on August 15, 1975, when demand for payment was made on defendant following maker's default; and (3) defendant could not escape liability by contending that since term "indorser" was spelled with an "i" in UCC § 3-122(3) and with an "e" ("endorser") in note sued on, provisions of UCC § 3-122(3) were inapplicable to case (also rejecting defendant's contention that since dishonor, or notice of dishonor, was not required as condition precedent to liability of guarantor, action against him in that capacity accrued on date note was executed). Central Jersey Bank & Trust Co. v. Lady Van Indus., Inc., 154 N.J. Super. 459, 381 A.2d 831 (1977), disapproved, Ligran, Inc. V. Medlawtel, Inc., 86 N.J. 583, 432 A.2d 502 (1981).

Where (1) bank's customer obtained loan from bank to buy car and later sold car and received check in payment, which was credited to customer's account, (2) customer then paid off loan by giving personal check to bank, (3) check credited to customer's account was later dishonored, and (4) customer's checking account lacked sufficient funds to charge back amount of dishonored check, bank as holder in due course of dishonored check had cause of action under UCC § 3-122(3) against customer as indorser of such check, following receipt of notice of check's dishonor. Serve v. First Nat'l Bank, 143 Ga. App. 239, 237 S.E.2d 719 (1977).

Demand note was mature and due when issued. Paine-Erie Hosp. Supply, Inc. v. Lincoln First Bank, 82 Misc. 2d 432 (1975).

In action to recover alleged indebtedness evidenced by check, check was demand instrument under UCC § 3-108 since no date for payment was indicated and, as such, any cause of action on debt accrued on date of instrument under UCC § 3-122. Turner v. State, 508 S.W.2d 861 (Tex. Civ. App. 1974).

Although cause of action accrues in case of demand instrument on its date under UCC § 3-122 (1)(b), where demand note was given to payee with instructions that it was to be held for payment until maker and his wife had died, note was subject to condition precedent and cause of action did not accrue and statute of limitations did not begin to operate until condition was performed; parol evidence was admissible for purpose of showing that promissory note, though absolute in form, delivered to manual possession of payee, was not intended to take effect as binding obligation until happening of stipulated contingency. Washington v. Martin, 503 S.W.2d 330 (Tex. Civ. App. 1973).

Instrument denominated "Retail Instalment Contract" which showed "seller" to be bsiness college and described articles sold or services rendered as "Med. Secretary Course," with cash price of $490, and which contained provision waiving defenses against assignee thereof, was not negotiable instrument as defined by UCC §§ 3-104 through 3-112, but came within Retail Instalment and Home Solicitation Sales Act. Grimes v. Community Loan & Inv. Corp., 130 Ga. App. 8, 202 S.E.2d 265 (1973).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months prior to maturity date "as authorized" was premature. Bank of New Effington v. Thompson, 502 P.2d 978 (Colo. Ct. App. 1972).

§ 75-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this chapter or Chapter 4, the defendant may give the third person notice of the litigation in a record, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two (2) litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

SOURCES: Former § 75-3-119: Codes, 1942, § 41A:3-119; Laws, 1966, ch. 316, § 3-119, eff March 31, 1968; Laws, 1992, ch. 420, § 19; Laws, 2010, ch. 506, § 16, eff from and after July 1, 2010.

§§ 75-3-120 through 75-3-122. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-120. [Codes, 1942, § 41A:3-120; Laws, 1966, ch. 316, § 3-120]
§ 75-3-121. [Codes, 1942, § 41A:3-121; Laws, 1966, ch. 316, § 3-121]
§ 75-3-122. [Codes, 1942, § 41A:3-122; Laws, 1966, ch. 316, § 3-122]

Editor's Note — Former § 75-3-120 described the function of an instrument payable through a bank.

Former § 75-3-121 described the function of an instrument payable at a bank.

Former § 75-3-122 stated when a cause of action against a maker or an acceptor accrued.

PART 2.

NEGOTIATION, TRANSFER, AND INDORSEMENT.

SEC.	
75-3-201.	Negotiation.
75-3-202.	Negotiation subject to rescission.
75-3-203.	Transfer of instrument; rights acquired by transfer.
75-3-204.	Indorsement.
75-3-205.	Special indorsement; blank indorsement; anomalous indorsement.
75-3-206.	Restrictive indorsement.
75-3-207.	Reacquisition.
75-3-208.	Repealed.

§ 75-3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

SOURCES: Former § 75-3-201: Codes, 1942, § 41A:3-201; Laws, 1966, ch. 316, § 3-201; Laws, 1992, ch. 420, § 20, eff from and after January 1, 1993.

Federal Aspects — Provisions of 20 USC §§ 1071 and 1078(b), see 20 USCS §§ 1071 and 1078(b).

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-2. [Reserved for future use].
3. Endorsement clause.
4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-202.

11. In general.
12. Indorsement.
13. —Forged or unauthorized indorsement.
14. —Separate writings as indorsements.
15. Partial or limited assignments.
16. Conditional or restrictive indorsement.

I. DECISIONS UNDER CURRENT LAW.

1.-2. [Reserved for future use].

3. Endorsement clause.

Endorsement clause appearing on a non-negotiable certificate of deposit (CD) is placed for the purpose of mitigating the risk that the issuing bank may make payment to someone not entitled to payment. The clauses are not meant to protect a depositor against withdrawals by a co-depositor and may be waived by the bank; therefore, even though endorsements were required for a negotiable instrument, this was not required for a non-negotiable CD. DeJean v. DeJean, 982 So. 2d 443 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 236 (Miss. 2008).

4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-202.

11. In general.

A money order may be either negotiable or nonnegotiable. If it is negotiable, the term "purchaser," with reference to the instrument, includes under UCC § 3-202(1) one who is a "holder" of the instrument. If a money order is not negotiable, the term "purchaser" will still include virtually all later transferees of the instrument, since such persons will have acquired their interest by some sort of voluntary transaction comprehended by UCC § 3-201. Aetna Cas. & Sur. Co. v. Schmitt, 441 F. Supp. 440 (N.D. Cal. 1977).

Document purporting to transfer and assign promissory note which was never attached to note did not serve as effective endorsement of note under UCC § 3-202(2); since note was not issued or endorsed to assignee, assignee was not holder of note as defined in UCC § 1-201(20) and, not being holder, assignee could not possibly be holder in due course and assignment of note was therefore subject to defense of failure of consideration. Billas v. Dwyer, 140 Ga. App. 774, 232 S.E.2d 102 (1976).

Where party to litigation admitted owing to opposing party specified sum of money which was paid into registry of court by certified check, but lapse of nine days occurred before check was deposited by court clerk in court's registry account, opponent was not entitled to interest on amount of check during nine-day period; although first party, as drawer, was not discharged until certified check was paid, nevertheless, check was negotiated by delivery to clerk, the named payee, and this had effect of suspending underlying obligation of party pro tanto, until instrument was presented for payment, and, thus, interest claimed by other party would be owing only if check had been dishonored when presented for payment. Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F. Supp. 1362 (N.D. Miss. 1975).

Where owners of real property subject to vendor's lien entered into agreement with holder of vendor's lien note that bank would pay note upon presentation of necessary documents to enable bank to succeed to full rights of holder, where holder sent note and assignment of note and lien to bank but bank declined to complete transaction because no endorsement had been made upon note itself, and where, after papers were returned to holder, deed of trust on property was foreclosed, tender of payment by owners invoked provisions of UCC § 3-604(1), so as to relieve owners of liability subsequent to such tender to pay interest, costs and attorney's fees. Penny v. Kelley, 528 S.W.2d 330 (Civ. App. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

Plaintiff-assignee of facsimile copy of promissory note was entitled to maintain action on note against defendant-maker, although plaintiff did not have possession of note, where bank that held note returned it to maker, though it had not been paid, and then subsequently prepared facsimile and assigned it to plaintiff. Plaintiff was not holder of note under UCC § 1-201(20), since he was never in possession of note, but he was transferee of note, though bank did not deliver it to him, and, as such, he could maintain action on note since maker had possession of note and note was in evidence. Scheid v. Shields, 269 Or. 236, 524 P.2d 1209 (1974).

12. Indorsement.

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255 (5th Cir. 1982).

Bank which took mortgage on assignment without indorsement of note supporting mortgage, and which did not notify maker of note about such assignment until interest payment was due, was not holder in due course under UCC § 3-202(1), providing that instrument payable to order is negotiated by delivery with any necessary endorsement. Second Nat'l Bank v. G.M.T. Properties, Inc., 364 So. 2d 59 (Fla. App. 1978).

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for $180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior $60,000 debt, indorsed them to creditor's order, and delivered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor $135,000 on notes and notes were still in creditor's possession as collateral for payment of $28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus due to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it, delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25, 1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first creditor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned to plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff not its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) because of first creditor's failure to indorse them to plaintiff's order (holding that plaintiff was entitled to receive, on behalf of its client, all installment payments due on notes, commencing with installment due on October 1, 1976). Lipkowitz & Plaut v. Affrunti, 95 Misc. 2d 849 (1978).

Where owners of real property subject to vendor's lien entered into agreement with holder of vendor's lien note that bank would pay note upon presentation of necessary documents to enable bank to succeed to full rights of holder, where holder sent note and assignment of note and lien to bank but bank declined to complete transaction because no endorsement had been made upon note itself, and where, after papers were returned to holder, deed of trust on property was foreclosed: (1) tender made by property owners qualified as legal tender under UCC § 2-511(2), unless holder was excused from his obligation to endorse note upon instrument itself; (2) assignment of vendor's lien note, without endorsement upon instrument itself, was not in compliance with provisions of UCC § 3-202(2) or commercial practices governing such transaction. Since holder failed to endorse note, he could not claim failure to tender money in discharge of obligation represented by note, and foreclosure of lien without giving owners reasonable time to comply with demands then made was unauthorized. Furthermore, tender of payment by owners invoked provisions of UCC § 3-604(1), so as to relieve owners of liability subsequent to such tender to pay interest, costs and attorney's fees. Penny v. Kelley, 528 S.W.2d 330 (Civ. App. 1975).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972).

13. —Forged or unauthorized indorsement.

Forged signature of payee on front of check did not preclude defendant's conviction for forgery since UCC § 3-202(2) does not specify any specific location for an indorsement, nor was there any indication that the signature was not intended as an indorsement within the meaning of UCC § 3-402. United States v. Tufi, 536 F.2d 855 (9th Cir. Haw. 1976).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i.e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. Tubin v. Rabin, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), aff'd, 533 F.2d 255 (5th Cir. Tex. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. Sumiton Bank v. Funding Sys. Leasing Corp., 512 F.2d 774 (5th Cir. Ala. 1975).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where plaintiff took draft upon indorsement of one of two named payees and forged indorsement of other payee, transfer conferred upon plaintiff interest of payee who did indorse draft, and no more. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

14. —Separate writings as indorsements.

UCC § 3-202(2), requiring indorsement to be on instrument itself or on paper "so firmly affixed" to instrument as to become part thereof, evidences clear intent to restrict use of "allonge" (paper annexed to note for purpose of writing indorsements thereon where instrument itself has insufficient space for such indorsements). Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Bank which took four notes from debtor, which were executed to debtor by third party and assigned by debtor to bank as collateral for another note that debtor executed to bank, was not holder in due course of such notes where (1) debtor did not indorse notes; (2) debtor's signature on single collateral assignment did not constitute indorsement of notes under UCC § 3-202(2), even though such assignment was stapled to notes and expressly referred to them, since assignment was not "so firmly affixed" to notes as to become extension or part of each note; and (3) doctrine of incorporation by reference would not be extended to indorsements of negotiable instruments. Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Stapling endorsement to checks was permanent attachment so that it became "a part thereof" within meaning of UCC § 3-202(2) and was sufficient to make assignee of checks holder thereof where checks were endorsed to assignee by name, thus qualifying as special endorsement, where subject endorsement was typed on two legal size sheets of paper, and it would have been physically impossible to place all of this language on two small checks, and where endorsement was affixed by stapling it to checks. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

The indorsement necessary for negotiation under UCC § 3-202 cannot be on separate paper pinned or clipped to instrument purportedly being indorsed. Tallahassee Bank & Trust Co. v. Raines, 125 Ga. App. 263, 187 S.E.2d 320 (1972).

An endorsement written on a separate sheet of paper not firmly affixed to note, but merely clipped to it, does not meet the requirements of subsec. (2). James Talcott, Inc. v. Fred Ratowsky Assocs., 38 Pa. D. & C.2d 624 (1965).

15. Partial or limited assignments.

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. Lipkowitz & Plaut v. Affrunti, 95 Misc. 2d 849 (1978).

The pledgee of promissory notes to secure a debt is the purchaser of a limited interest under § 3-302(4), and not the holder of a limited assignment under § 3-202(3). Wood v. Willman, 423 P.2d 82 (Wyo. 1967).

A fractional interest in a negotiable instrument may be "assigned" even though an indorsement must be an indorsement of the entire instrument as "indorsement" relates to negotiation and not assignment. D'Orazi v. Bank of Canton, 254 Cal. App. 2d 901 (5th Dist. 1967).

16. Conditional or restrictive indorsement.

Written instructions on reverse side of checks which were properly dated (i.e., dated as of time of issue), limiting time for deposit to future date, did not preclude instruments from being payable on demand as required by UCC § 3-104(2)(b); instructions on checks could not be regarded as qualified or restrictive endorsements since drawer was not holder of checks and, since instructions were not endorsements, they were not binding on payee or on subsequent holders. Silver Creations, Ltd. v. UPS, 133 N.J. Super. 543, 337 A.2d 641, 88 A.L.R.3d 1093 (L. Div. 1975).

The plaintiff's motion for summary judgment in lieu of complaint against an insurance broker brought on five separate "premium finance agreements" was denied, where the assignment of the notes by the broker to plaintiff was controlled by Banking Law § 566 subd 2 which provided that the assigning broker could only be held as an indorser "with recourse" upon an express agreement to that effect, notwithstanding contrary provisions of the Uniform Commercial Code that would be applicable if the instrument was a conventional promissory note. Accordingly, plaintiff was granted leave to serve a complaint. Standard Premium Plan Corp. v. Wolf, 56 Misc. 2d 522 (1968).

RESEARCH REFERENCES

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-202. Negotiation subject to rescission.

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity, (ii) by fraud, duress, or mistake, or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

SOURCES: Former § 75-3-202: Codes, 1942, § 41A:3-202; Laws, 1966, ch. 316, § 3-202; Laws, 1986, ch. 401, § 2; Laws, 1992, ch. 420, § 21, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-207.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-207.

11. In general.

Free right of negotiation inures to benefit of payee of check even though he may have obtained instrument by fraud. Johnson v. State, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

An infant cannot rescind a negotiable instrument as against a subsequent holder in due course. Snyder v. Town Hill Motors, Inc., 193 Pa. Super. 578, 165 A.2d 293 (1960).

Where a minor purchased an automobile from a friend, agreeing to give the latter a check as part payment, and the friend directed the minor to indorse and deliver the check to a motor company as down payment on an automobile for the friend, the motor company, having received the instrument by negotiation from the friend for value, in good faith, and without notice that it was overdue or had been dishonored or that there was any defense against it, was a subsequent holder in due course. The fact that the check was not manually transferred from the minor to the friend and then to the motor company was immaterial; constructive delivery being sufficient. Snyder v. Town Hill Motors, Inc., 193 Pa. Super. 578, 165 A.2d 293 (1960).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. Garnett v. Associates Disct. Corp., 233 Miss. 849, 103 So. 2d 368 (1958).

Defenses existing between original parties were not available against bona fide purchaser, acquiring note and conditional sale contract before maturity. Commercial Credit Co. v. Summers, 154 Miss. 501, 122 So. 541 (1929).

Purchaser after maturity from holder in due course held not affected by agreement for cancellation between maker and payee. Rhymes v. Boggess, 146 Miss. 707, 111 So. 844 (1927).

Purchaser's knowledge that stock for which note was executed was valueless at time of purchase held no defense. McAnge v. Falls, 145 Miss. 471, 110 So. 840 (1927).

Accommodation party liable to holder for value only when he became such before maturity. Rylee v. Wilkinson, 134 Miss. 663, 99 So. 901 (1924).

Failure of consideration no defense against bona fide purchaser. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

Failure of corporation payee to file charter as condition to doing business no defense against bona fide holder. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

Where note was assigned as security, assignee became holder for value and it became free of any defense existing between maker and payee. First Nat'l Bank v. John McGrath & Sons Co., 111 Miss. 872, 72 So. 701 (1916).

§ 75-3-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

SOURCES: Former § 75-3-203: Codes, 1942, § 41A:3-203; Laws, 1966, ch. 316, § 3-203; Laws, 1992, ch. 420, § 22, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.
12. Transferee as acquiring transferor's rights.
13. —Fraud or illegality.
14. —Notice of claim or defense.
15. —Security interests.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.

It is elementary commercial law that a note can be transferred from a holder to a transferee, and that the transferee has at least the same rights as the transferor (holding that transferee of over-due promissory note was proper party to enforce collection of note). Ford Motor Credit Co. v. Soileau, 357 So. 2d 563 (La. App. 1978).

Transfer of instrument vests in transferee such rights as transferor has therein and, thus, payee of check succeeds to all rights of drawer when such check is transferred and delivered to payee. Johnson v. State, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

12. Transferee as acquiring transferor's rights.

Protection of holder-in-due-course status was not transferred by bank to plaintiff under UCC § 3-201(1), with respect to certificate of deposit which plaintiff purportedly purchased from bank and which was dishonored on its maturity by second bank, to which first bank presented it for payment, because of second bank's prior lien thereon, where first bank had no right to sell certificate to plaintiff, was not its true transferor, and true transferor was not a holder in due course. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. N.C. 1978).

A money order may be either negotiable or nonnegotiable. If it is negotiable, the term "purchaser," with reference to the instrument, includes under UCC § 3-202(1) one who is a "holder" of the instrument. If a money order is not negotiable, the term "purchaser" will still include virtually all later transferees of the instrument, since such persons will have acquired their interest by some sort of voluntary transaction comprehended by UCC § 3-201. Aetna Cas. & Sur. Co. v. Schmitt, 441 F. Supp. 440 (N.D. Cal. 1977).

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

Plaintiff-assignee of facsimile copy of promissory note was entitled to maintain action on note against defendant-maker, although plaintiff did not have possession of note, where bank that held note returned it to maker, though it had not been paid, and then subsequently prepared facsimile and assigned it to plaintiff. Plaintiff was not holder of note under UCC § 1-201(20), since he was never in possession of note, but he was transferee of note, though bank did not deliver it to him, and, as such, he could maintain action on note since maker had possession of note and note was in evidence. Scheid v. Shields, 269 Or. 236, 524 P.2d 1209 (1974).

Where corporation paid note signed by corporation president but not by corporation, corporation acquired rights of transferee and could not enforce note against maker until date when it could have been enforced by transferor; so that corporation as account debtor was not entitled to set off, since it had had notification of assignment of accounts more than 3 months before claim against assignor on note accrued. Commercial Sav. Bank v. G & J Wood Prods. Co., 46 Mich. App. 133, 207 N.W.2d 401 (1973).

Since bank-transferor was holder in due course and plaintiff-transferee was not prior holder, plaintiff-transferee acquired rights of holder in due course irrespective of question of value. Canyonville Bible Academy v. Lobemaster, 108 Ill. App. 2d 318, 247 N.E.2d 623 (4th Dist. 1969).

One discharging an ordinary negotiable instrument by payment could have the rights of a holder in due course only if his immediate predecessor had similar rights, and where the immediate predecessor was an agent he could not have had the rights of a holder in due course as against the principal. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

13. —Fraud or illegality.

In the absence of any fraud or illegality, the accommodation maker of note who paid it and was assigned the note and real estate mortgage securing it became subrogated to the rights of the former holder and could sue the maker on the note and foreclose the mortgage. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

14. —Notice of claim or defense.

The exclusion from the shelter principle in UCC § 3-201(1) of one who, with notice of prior claims, takes back an instrument from a holder in due course, rests on sound logic. Operation of the shelter principle in favor of such a person would defeat the purpose of subjecting him to defenses of the maker. Without this exception to the shelter principle, one who is not a holder in due course, by a transfer and an agreement to repurchase, could readily avoid the limitations under which he held the instrument in the first place. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. N.C. 1978).

Protection of holder-in-due-course status was not transferred by bank to plaintiff under UCC § 3-201(1), with respect to certificate of deposit which plaintiff purportedly purchased from bank and which was dishonored on its maturity by second bank, to which first bank presented it for payment, because of second bank's prior lien thereon, where first bank had no right to sell certificate to plaintiff, was not its true transferor, and true transferor was not a holder in due course. Rozen v. North Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. N.C. 1978).

Where transferee bank's security interest in notes was not obtained prior in time to interest therein that it took by assignment in transfer from transferor bank, transferee bank was not prior holder of note, within meaning of § 3-201, with notice of defenses thereto. Doctors Hosp. of Texarkana, Inc. v. Republic Nat'l Bank, 498 S.W.2d 466 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 17, 1973).

One who took as successor to holder in due course, by reacquiring notes after participating fully in underlying transactions, had actual notice of defense of discharge, so that defense could be asserted, since successor did not have holder in due course status under UCC § 3-302 because of exception within UCC § 3-201(1) relating to transferee who as prior holder had notice of defense. Coplan Pipe & Supply Co. v. Ben-Frieda Corp., 256 So. 2d 218 (Fla. App. 1972).

Where a holder takes with knowledge of a defense, he cannot improve his position by a transfer to a holder in due course and the subsequent reacquisition of the instrument from such holder. Program Aids Co. v. W. R. Bean & Son, Inc., 4 U.C.C. Rep. Serv. 210 (1967, NY Sup).

One with the rights of a holder in due course of a promissory note, who has not otherwise lost such rights, does not diminish his status by purchasing the note later at a judicial sale, although he may not by virtue of such purchase alone become a due course holder. Finance Co. of Am. v. Wilson, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank which for the second time accepted for deposit to the personal account of the officer of a corporation in receivership a long past due check payable to the corporation's order, at a time when the bank had knowledge of the receivership, could not be a holder in due course when the drawee bank again refused payment. County Trust Co. v. Pascack Valley Bank & Trust Co., 93 N.J. Super. 252, 225 A.2d 605 (App. Div. 1966).

15. —Security interests.

Under UCC §§ 3-201(2), which deals with transfer of security interest in instrument, and 9-207(1), which deals with secured party's duty to preserve collateral in his possession, where payee of note executed by defendant assigned such note to bank as collateral security for loan, (1) payee had no right to compromise or settle note, or to take any action that might diminish bank's interest therein, and (2) bank's title thereto, to extent of debt owed to it by payee, was paramount. Moreover, after balance of payee's debt to bank had been paid by note's maker and bank had returned note to payee, note was still valid and outstanding, although maker was entitled to credit thereon for amount that he had paid bank in order to discharge payee's indebtedness to bank. Vinson v. McCarty, 413 So. 2d 1026 (Miss. 1982).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. Lipkowitz & Plaut v. Affrunti, 95 Misc. 2d 849 (1978).

Where bank issued cashier's check to individual who had personally guaranteed certain notes which were payable to borrowers from bank and were held by bank as collateral security for loans made to such borrowers, and where guarantor subsequently became bankrupt, bank was, at very least, transferee of unindorsed order instruments which bankrupt had personally guaranteed and, therefore, by virtue of proof that it took notes in proper transactions with holders thereof and "shelter" provisions of UCC § 3-201, bank succeeded to rights of transferors of holders of instruments, to full extent of its security interest; under UCC §§ 3-301 and 3-603(1), holder of instrument, whether or not true owner, could enforce payment thereon and discharge paying party, and thus, if bank could demand payment from guarantor when due, bank was entitled to file in its own right proof of claim in bankruptcy and to assert setoff against cashier's check. In re Johnson, 552 F.2d 1072 (4th Cir. Va. 1977).

Where corporate officer delivered to bank note payable to corporation and where proceeds of note were credited to corporate account and were thereafter drawn against by corporation, transfer of note to bank for value gave bank "the specifically enforceable right to have the unqualified indorsement" of corporation on note, even though bank had no corporate resolution authorizing officer to deal with bank. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

§ 75-3-204. Indorsement.

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument; provided, however, that an indorsement of instruments representing student loans, including loans that are insured by the United States Secretary of Education under 20 U.S.C.A. 1071, et seq., as amended, or by a state or nonprofit private institution or organization with which the United States Secretary of Education has an agreement under 20 U.S.C.A. 1078(b) as amended, may be made by signed blanket indorsement, rather than in the manner otherwise provided in this subsection, if a notation to that effect is made in the name of the transferee on the instrument representing the student loan.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

SOURCES: Former § 75-3-204: Codes, 1942, § 41A:3-204; Laws, 1966, ch. 316, § 3-204; Laws, 1992, ch. 420, § 23, eff from and after January 1, 1993.

Federal Aspects — Loans inspired by the United States Secretary of Education under 20 U.S.C.A. 1071, et seq., see 20 USCS § 1071 et seq.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.
12. Right to indorsement.
13. —"For value."
14. —Payable to order or bearer.
15. When negotiation occurs.
16. —Ownership rights absent indorsement.
17. —Presumption of ownership.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.

Under UCC § 3-203 (dealing with wrong or misspelled names), check mistakenly made payable to "Robert L. Agaliotis" instead of "Louis Agaliotis" could properly be indorsed by intended payee in his own name, or in name of named payee, or with both such names. Agaliotis v. Agaliotis, 38 N.C. App. 42, 247 S.E.2d 28 (1978).

Under UCC § 3-203, check with misspelled name of payee was valid and negotiable where check was endorsed with correct spelling. State v. Powell, 220 Kan. 168, 551 P.2d 902 (1976).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972).

Payee is under no duty to authorize check made out to payee under erroneous designation, and such an unendorsed check would not constitute payment or tender of payment to payee. Moore v. Copeland, 478 S.W.2d 573 (Tex. Civ. App. 1972), ref. n.r.e (June 21, 1972).

A transferee who has neglected to obtain the indorsement necessary to make him a holder may enforce a note, foreclose on collateral, and obtain a deficiency judgment against the debtor. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The instant section purports to give only an indorsee for value, and not the maker of the note, the power to require indorsement in both names under the circumstances stated in the section. Watertown Fed. Sav. & Loan Ass'n v. Spanks, 346 Mass. 398, 193 N.E.2d 333 (1963).

12. Right to indorsement.

Where corporate officer delivered to bank note payable to corporation and where proceeds of note were credited to corporate account and were thereafter drawn against by corporation, transfer of note to bank for value gave bank "the specifically enforceable right to have the unqualified indorsement" of corporation on note, even though bank had no corporate resolution authorizing officer to deal with bank. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

13. —"For value."

Where obligor by property settlement agreement and contract agreed for note to be transferred to wife and knew that such transfer was to be made and that no particular method for such transfer was provided, delivery to wife of promissory note payable to her father with intent to invest wife with ownership was effective gift of note and did not require written transfer. Waters v. Waters, 498 S.W.2d 236 (Tex. Civ. App. 1973), ref. n.r.e (Jan. 16, 1974).

The assignee of an unindorsed note may enforce the note as against an accommodation party where the transfer was made for value, as in such case he had the right to obtain the necessary indorsement and therefore should be regarded as a holder. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. —Payable to order or bearer.

Final clause of UCC § 3-201(3), which provides that until instrument is indorsed there is no presumption that transferee is its owner, is intended to make clear that transferee without indorsement of order instrument is not holder of such instrument and thus is not aided by presumption, provided by UCC § 3-307(2), that holder of instrument is entitled to recover thereon. In such case, terms of obligation do not run to transferee without indorsement, and he must account for his possession of the unindorsed paper by proving transaction through which he acquired it (where transferee of two promissory notes testified only as to some of the circumstances under which she acquired possession of notes, and court ordered new trial of action). Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Although, under UCC § 3-201, holder of instrument payable to his order may transfer it for value without endorsing it, mere possession of unendorsed instrument is not prima facie evidence of ownership; thus, if face of instrument indicates title is in any person other than possessor, burden would be on possessor to prove his ownership by a valid transfer. N.E. England Assocs. v. Davis, 333 So. 2d 696 (La. App. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. Sumiton Bank v. Funding Sys. Leasing Corp., 512 F.2d 774 (5th Cir. Ala. 1975).

15. When negotiation occurs.

In action by materials supplier against subcontractor to recover entire proceeds of four checks drawn by general contractor and made jointly payable to both supplier and subcontractor, where subcontractor surrendered all four checks to supplier without indorsement and general contractor's bank, at supplier's request, exchanged such checks for two cashier's checks made payable to supplier and subcontractor, (1) bank by exchanging checks originally issued for cashier's checks did not alter rights of parties named in originally issued checks; (2) drawer of original checks (general contractor) was not placed at disadvantage because drawer's account was immediately chargeable on presentation and acceptance of original checks; (3) payees of original checks (supplier and subcontractor) were also not placed at disadvantage because funds in same amount were available to them from the cashier's checks; (4) validity of drawer's order to bank to make payment to payees named in original checks was not in question; and (5) making of cashier's checks payable to payees named therein (supplier and subcontractor) did not circumvent purpose of requirement of indorsements, since indorsements would still be routinely required under UCC § 3-104(2)(b) and UCC §§ 3-201 et seq. to negotiate the cashier's checks. In such case, bank was not negligent in performing customer's orders under rule that bank will be protected if it pays without indorsement as long as payee actually receives money ordered by drawer to be paid. Swan Air Conditioning Co. v. Crest Constr. Corp., 568 P.2d 1330 (Okla. Ct. App. 1977).

Notwithstanding that transferor of notes was a holder, bank that took several unindorsed notes as collateral for loan did not acquire status of holder under UCC § 3-201, which provides that transfer of instrument vests in transferee such rights as transferor had, since statute also distinguishes between mere transfer and negotiation and provides that negotiation conferring holder status occurs only when indorsement is made. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555 (2d Dist. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. Sumiton Bank v. Funding Sys. Leasing Corp., 512 F.2d 774 (5th Cir. Ala. 1975).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972).

16. —Ownership rights absent indorsement.

In action by corporation and individual plaintiffs, who were sole shareholders of such corporation, to recover on dishonored check made out to individual plaintiffs by one who represented defendant buyers of plaintiff corporation, where (1) plaintiffs, after being informed by defendants that check would not be honored, indorsed check to second corporation with notation, "for funds advanced," (2) second corporation indorsed check to bank for deposit only and sent check to bank for collection, (3) bank, after indorsing and sending check for collection, physically returned it after dishonor to second corporation, and (4) second corporation then physically returned it without indorsement to plaintiffs and assigned to plaintiffs all of second corporation's right, title, and interest therein, trial court properly held (1) that plaintiffs had standing to sue on check, even though they were not holders or transferees for value, since transfers specified in UCC § 3-201(1) are not limited to transfers for value, and (2) that since plaintiffs, although transferees without indorsement, proved transaction by which they had acquired check from holder, they therefore acquired rights of a holder and were entitled, on check's production, to presumption of entitlement to recovery under UCC § 3-307(2) because defendants did not establish defense to recovery. Perry & Greer, Inc. v. Manning, 282 Or. 25, 576 P.2d 791 (1978).

Final clause of UCC § 3-201(3), which provides that until instrument is indorsed there is no presumption that transferee is its owner, is intended to make clear that transferee without indorsement of order instrument is not holder of such instrument and thus is not aided by presumption, provided by UCC § 3-307(2), that holder of instrument is entitled to recover thereon. In such case, terms of obligation do not run to transferee without indorsement, and he must account for his possession of the unindorsed paper by proving transaction through which he acquired it (where transferee of two promissory notes testified only as to some of the circumstances under which she acquired possession of notes, and court ordered new trial of action). Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Although, under UCC § 3-201, holder of instrument payable to his order may transfer it for value without endorsing it, mere possession of unendorsed instrument is not prima facie evidence of ownership; thus, if face of instrument indicates title is in any person other than possessor, burden would be on possessor to prove his ownership by a valid transfer. N.E. England Assocs. v. Davis, 333 So. 2d 696 (La. App. 1976).

A transferee who has neglected to obtain the indorsement necessary to make him a holder may enforce a note, foreclose on collateral, and obtain a deficiency judgment against the debtor. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

17. —Presumption of ownership.

In action to determine whether two certificates of deposit should be included in estate of decedent, certificates of deposit were not negotiable under UCC § 3-104 where there were neither payable to order nor to bearer on their face; certificates of deposit were governed by UCC pursuant to UCC § 3-805 where they satisfied all attributes of negotiable instrument except words of negotiability; cousin of decedent was entitled to one of certificates of deposit where decedent had indorsed it in blank and physically delivered it to him, thereby creating presumption of valid and intentional delivery under UCC § 3-201 of inter vivos gift, and where this presumption was not overcome by evidence that periodic interests payments which accrued on certificate continued to be deposited into separate savings account belonging to decedent. Rand v. Moore, 414 So. 2d 885 (Miss. 1981).

A decedent's indorsement in blank on the back of a certificate of deposit combined with physical delivery to his cousin created a presumption of a valid and intentional delivery under §§ 75-3-201 and 75-3-805 (repealed), which presumption was not overcome by evidence that the periodic interest payments accruing on the certificate continued to be deposited into separate savings accounts belonging to the decedent. Rand v. Moore, 414 So. 2d 885 (Miss. 1981).

Title-that is, the ownership rights-to a negotiable instrument generally does not pass, as between the immediate parties, until there is a manual or actually authorized delivery of the instrument. However, where a negotiable instrument is no longer in the possession of a person whose signature appears thereon, a valid and intentional delivery by that person is presumed until the contrary is proved; holding that check payable to deceased, which deceased before committing suicide indorsed in blank and placed on table (in apartment that she shared with plaintiff) beside handwritten note in which she bequeathed all her possessions to plaintiff, had been validly delivered to plaintiff, since deceased plainly intended to give check to plaintiff and had expected that he would find it on table where she left it). Scherer v. Hyland, 153 N.J. Super. 521, 380 A.2d 704 (1976), aff'd, 75 N.J. 127, 380 A.2d 698 (1977).

§ 75-3-205. Special indorsement; blank indorsement; anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement." When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in Section 75-3-110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement." When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) "Anomalous indorsement" means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated.

SOURCES: Former § 75-3-205: Codes, 1942, § 41A:3-205; Laws, 1966, ch. 316, § 3-205; Laws, 1992, ch. 420, § 24, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-204.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-204.

11. In general.

Under UCC § 3-204(2), promissory notes originally made payable to order of specified payee became, on payee's in blank indorsement of notes, payable to bearer and negotiable by delivery alone. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. Sumiton Bank v. Funding Sys. Leasing Corp., 512 F.2d 774 (5th Cir. Ala. 1975).

Stapling endorsement to checks was permanent attachment so that it became "a part thereof" within meaning of UCC § 3-202(2) and was sufficient to make assignee of checks holder thereof where checks were endorsed to assignee by name, thus qualifying as special endorsement, where subject endorsement was typed on two legal size sheets of paper, and it would have been physically impossible to place all of this language on two small checks, and where endorsement was affixed by stapling it to checks. Lamson v. Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i. e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. Tubin v. Rabin, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), aff'd, 533 F.2d 255 (5th Cir. Tex. 1976).

Party to whom presentment was made of check bearing blank rubber stamp endorsement, not restricted to "for deposit only" had right to deliver cash to party making presentment instead of depositing proceeds of check in endorser's account, since blank endorsement constitutes authorized endorsement under UCC § 3-204. Palmer & Ray Dental Supply of Abilene, Inc. v. First Nat'l Bank, 477 S.W.2d 954 (Tex. Civ. App. 1972).

Where plaintiff's employee made deposits for it at defendant bank but instead of depositing checks at issue she drew cash on them and did not account to plaintiff for such money, blank rubber stamp indorsement of plaintiff affixed to each of checks constituted authorized indorsement, relieving bank of liability for conversion. Palmer & Ray Dental Supply of Abilene, Inc. v. First Nat'l Bank, 477 S.W.2d 954 (Tex. Civ. App. 1972).

Authorized representative of payee-hospital indorsed note without specifying to whom or to whose order instrument was payable; held, mere delivery is sufficient to constitute transferee holder thereof and to make transfer valid negotiation. Davtian v. Barsamian, 106 R.I. 185, 256 A.2d 510 (1969).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signatures of the payee under §§ 3-404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. American Book Co. v. White Sys. of Jackson, 223 Miss. 510, 78 So. 2d 582 (1955).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank and with whose signature it is not familiar, and under no duty to become familiar. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

§ 75-3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement (i) described in Section 75-4-201(b), or (ii) in blank or to a particular bank using the words "for deposit," "for collection," or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement.

(2) A depositary bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement.

(3) A payor bank that is also the depositary bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement.

(4) Except as otherwise provided in paragraph (3), a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c), if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in Section 75-3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser.

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) or has notice or knowledge of breach of fiduciary duty as stated in subsection (d).

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this section applies and the payment is not permitted by this section.

SOURCES: Former § 75-3-206: Codes, 1942, § 41A:3-206; Laws, 1966, ch. 316, § 3-206; Laws, 1992, ch. 420, § 25, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-205, 75-3-206.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-205, 75-3-206.

11. In general.

The drawer of a check may sue a depositary bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depositary bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depositary bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under the common law, a collecting bank as well as a depositary bank when presented with restrictive indorsements on checks has a duty to inquire and its failure to do so subjects it to liability, and failure to conform to the standard of care set forth in Section 3-206 of the Uniform Commercial Code, which enjoins a depositary bank to pay or apply value given for restrictively indorsed checks according to their tenor, is indicative of bad faith. Accordingly, a complaint which alleges that checks restrictively indorsed were accepted by defendant bank and the proceeds were applied to the credit of accounts other than those indicated in the indorsements, an employee of plaintiff having stolen the checks, restrictively indorsed them and then deposited them to the employee's or his confederate's accounts with the defendant bank, states a cause of action. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 61 A.D.2d 628 (1st Dep't 1978), aff'd, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979).

Under UCC § 3-206(3) and other sections of Uniform Commercial Code dealing with restrictive indorsements, depositary bank that does not apply instrument consistently with restrictive indorsement thereon is liable in conversion, and any defense afforded by UCC § 3-419(3) would not be available to such bank. C.S. Bowen Co. v. Maryland Nat'l Bank, 36 Md. App. 26, 373 A.2d 30 (1977).

Writing which was physically attached to note and which purported to be "for collection purposes" constituted restrictive indorsement under UCC § 3-205. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), review allowed, 293 N.C. 159, 236 S.E.2d 702 (1977), rev'd on other grounds, 294 N.C. 146, 240 S.E.2d 360 (1978).

While a postal domestic money order is similar in many respects to a negotiable instrument, it is not so similar in all respects because the restriction contained in such a money order that "more than one indorsement is prohibited by law" is contrary to § 3-301 of the instant chapter relative to the transfer and negotiation of an instrument by a holder, and it is not in harmony with § 3-206(1) which provides that "No restrictive indorsement prevents further transfer or negotiation of the instrument". United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signature of the payee under §§ 30404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. American Book Co. v. White Sys. of Jackson, 223 Miss. 510, 78 So. 2d 582 (1955).

Where a check was genuine and was duly indorsed in blank by the payee named therein, and the check was negotiable even though in possession of a person not entitled thereto, and innocent purchaser for value becomes a holder in due course. Bruce v. State, 217 Miss. 368, 64 So. 2d 332 (1953).

§ 75-3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is canceled is discharged, and the discharge is effective against any subsequent holder.

SOURCES: Former § 75-3-207: Codes, 1942, § 41A:3-207; Laws, 1966, ch. 316, § 3-207; Laws, 1992, ch. 420, § 26, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-208.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-208.

11. In general.

Promissory notes, executed by closely held corporation and endorsed by stockholders of corporation, were not discharged when they were acquired from payee bank by executor of deceased endorser; among other things, instruments were acquired by executor, not be deceased endorser, and executor was, therefore, not prior party to instrument. Eikel v. Bristow Corp., 529 S.W.2d 795 (Tex. Civ. App. 1975).

Where payee of check endorsed it to third party but, instead of transferring check to endorsee, cancelled endorsement and then deposited check in her own account, depositary bank, as collecting bank, was under no duty to inquire as to deleted endorsement. Handley v. Horak, 82 Misc. 2d 692 (1975).

Where payee of check from insurer endorsed check to his physician, physician endorsed check but then gave it back to payee for purpose of returning check to insurer on basis that it was of lesser amount than physician felt insurer was obligated to pay under payee's policy, and where payee crossed out physician's restrictive endorsement, re-endorsed check and presented it to bank for payment, bank was not liable in conversion as depository bank for failing to inquire further into title to check. Schoonmaker v. Merchants Nat'l Bank & Trust Co., 81 Misc. 2d 967 (1974).

Where several banks orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company got possession of checks when banks were reimbursed, not at later time when company, upon discovering forged indorsements on checks, paid grower-payee; and by getting grower-payee to indorse check already in company's possession, and which had ceased to be negotiable instrument, company did not relinquish its claim against bank for wrongfully paying check bearing forged indorsement; to the contrary, company's conduct went to prove damage which company suffered from bank's paying to another its check intended for grower, but of which grower never became holder. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

§ 75-3-208. Repealed.

Repealed by Laws, 1992, ch. 420 § 112, eff from and after January 1, 1993. [Codes, 1942, § 41A:3-208; Laws, 1966, ch. 316, § 3-208]

Editor's Note — Former § 75-3-208 dealt with reacquisition of instruments.

PART 3.

ENFORCEMENT OF INSTRUMENTS.

SEC.
75-3-301. Person entitled to enforce instrument.
75-3-302. Holder in due course.
75-3-303. Value and consideration.
75-3-304. Overdue instrument.
75-3-305. Defenses and claims in recoupment.
75-3-306. Claims to an instrument.
75-3-307. Notice of breach of fiduciary duty.
75-3-308. Proof of signatures and status as holder in due course.
75-3-309. Enforcement of lost, destroyed, or stolen instrument.
75-3-310. Effect of instrument on obligation for which taken.
75-3-311. Accord and satisfaction by use of instrument.
75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

§ 75-3-301. Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 75-3-309 or 75-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

SOURCES: Former § 75-3-301: Codes, 1942, § 41A:3-301; Laws, 1966, ch. 316, § 3-301; Laws, 1992, ch. 420, § 27, eff from and after January 1, 1993.

Cross References — Plaintiff who proves entitlement to enforce instrument under this section as entitled to payment upon proof or admission of validity of signatures and compliance with § 75-3-308(a), see § 75-3-308.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-2. [Reserved for future use].
3. Holder in due course.
4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-301.

11. In general.
12. Requirements for action.
13. Ownership.
14. Guarantee.

I. DECISIONS UNDER CURRENT LAW.

1.-2. [Reserved for future use].

3. Holder in due course.

Where an assignee bought a note and deed of trust before defendant borrower filed suit alleging fraud by the funding lender, the assignee and plaintiff, its loan servicer, were holders in due course entitled to sue on the note under Miss. Code Ann. §§ 75-3-301, 75-3-302(a). Ocwen Loan Servicing, LLC v. Branaman, 554 F. Supp. 2d 645 (N.D. Miss. 2008).

4.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-301.

11. In general.

The holder of a note may waive the right to foreclose for past defaults in payment (see UCC § 3-301) if he has regularly accepted late payments and not notified the debtor that future defaults will provide the basis for foreclosure proceedings. Rutherford v. Rutherford, 573 S.W.2d 299 (Tex. Civ. App. 1978).

In suit to recover on two promissory notes in plaintiff's possession, plaintiff was not "holder" of notes within meaning of UCC § 1-201(20) where notes were not drawn, issued, or indorsed to her or to her order, or to bearer or in blank, and trial court erred in according plaintiff rights of holder under UCC § 3-301. Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCS 1703(b)), should have alerted assignee to possible irregularities in making of note. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

Possessor of promissory notes, which were made payable to payee with name different from name of possessor and which were unendorsed by named payee, was entitled to recover on notes pursuant to UCC § 3-301, even though possessor was not a holder under UCC § 1-201(20), where evidence at trial established that name of payee was former name of possessor. Lawson v. Finance Am. Private Brands, Inc., 537 S.W.2d 483 (Tex. Civ. App. 1976).

Joint payee, who in good faith takes instrument for value, without notice of any dishonor or defense, is entitled to enforce instrument against maker thereof. National Sec. Fire & Cas. Co. v. Mazzara, 289 Ala. 542, 268 So. 2d 814 (1972).

While a postal domestic money order is similar in many respects to a negotiable instrument it is not so similar in all respects because the restriction contained in such a money order that "more than one indorsement is prohibited by law" is contrary to § 3-301 of the instant chapter relative to the transfer and negotiation of an instrument by a holder, and it is not in harmony with § 3-206(1) which provides that "No restrictive indorsement prevents further transfer or negotiation of the instrument". United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

A bank which cashed a check endorsed in blank by the payee by crediting the payee's account and by the delivery of cash was entitled to summary judgment in an action against the maker who had issued a stop payment order to the drawee bank. Although the drawer of a check has the right to stop payment of it at any time before it has been certified or paid by the drawee, the drawer remains liable, unless he has a defense good against the holder. Tidwell v. Bank of Tifton, 115 Ga. App. 555, 155 S.E.2d 451 (1967).

Where a promissory note is made payable to one named therein as attorney for plaintiffs but not endorsed to them by the attorney, plaintiffs may enforce payment as holders of the note. Bennett v. Cannon, 114 Ga. App. 479, 151 S.E.2d 828 (1966).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

12. Requirements for action.

In order to show right to summary judgment in suit on promissory note in which the defendant has made a general denial, the plaintiff must establish that he is the present legal owner or holder of such note. Under UCC § 1-201(20), a "holder" is the person in possession of a note drawn, issued, or indorsed to him, or to his order or to bearer, or in blank. And under UCC § 3-301, even if the holder is not the owner of the note, he may still enforce payment thereof in his own name. Taylor v. Fred Clark Felt Co., 567 S.W.2d 863 (Tex. Civ. App. 1978), ref. n.r.e (Oct. 25, 1978).

Depository bank's assignee did not have possession of check at time of commencement of action against drawer for amount which depository bank had paid from payee's account against credit created by deposit of drawer's check before that check had been dishonored; held, assignee was not "holder" and could not maintain action against drawer, even though, after commencement of action, payee had given depository bank check and, prior to commencement of action, payee had assigned partial interest in proceeds of check to depository bank. Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp., 255 Or. 192, 465 P.2d 868 (1970).

13. Ownership.

Under UCC § 3-301, "ownership" of notes is not indispensable to "holdership" (holding that original payees of two notes were holders under UCC § 1-201(20) because they still had possession of notes). In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Although a holder does not become the holder in due course of an instrument by purchase of it at a judicial sale or by taking it under legal process, one with the rights of a holder in due course, and who has not lost such rights, does not diminish his status by purchasing an instrument at a judicial sale merely because he could not by virtue of such purchase alone become a due course holder. Finance Co. of Am. v. Wilson, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank which accepts a check for collection and, for that purpose, acts as its depositor's agent is also a holder of the check, and the fact that it does not own the item is immaterial insofar as its status as a holder is concerned. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

14. Guarantee.

Where bank issued cashier's check to individual who had personally guaranteed certain notes which were payable to borrowers from bank and were held by bank as collateral security for loans made to such borrowers, and where guarantor subsequently became bankrupt, bank was, at very least, transferee of unindorsed order instruments which bankrupt had personally guaranteed and, therefore, by virtue of proof that it took notes in proper transactions with holders thereof and "shelter" provisions of UCC § 3-201, bank succeeded to rights of transferors of holders of instruments, to full extent of its security interest; under UCC §§ 3-301 and

3-603(1), holder of instrument, whether or not true owner, could enforce payment thereon and discharge paying party, and thus, if bank could demand payment from guarantor when due, bank was entitled to file in its own right proof of claim in bankruptcy and to assert setoff against cashier's check. In re Johnson, 552 F.2d 1072 (4th Cir. Va. 1977).

Where defendants executed promissory note which was delivered to bank, note was guaranteed by Small Business Administration, defendants defaulted on payments under note, and note was assigned in accord with guarantee agreement to S.B.A., which made payment to bank of 50 per cent of unpaid balance of note, fact that government did not own entire equitable interest in note did not prevent government from maintaining suit on note as its legal owner and holder. United States v. Sellers, 487 F.2d 1268 (5th Cir. Tex. 1973).

In action by guarantor of renewal and extension promissory notes against maker, fact that guarantor was not holder in due course, because he took notes with notice that they were overdue, did not, under UCC § 3-302, prevent him as holder of notes under UCC § 1-201(20) from enforcing payment in his own name under UCC § 3-301. Blake v. Coates, 292 Ala. 351, 294 So. 2d 433 (1974).

RESEARCH REFERENCES

Law Reviews. Beane, Rights of Drawers, Banks, and Holders in Bank Checks and Other Cash Equivalents. 19 Tulsa L. J. 612, Summer, 1984.

§ 75-3-302. Holder in due course.

(a) Subject to subsection (c) and Section 75-3-106(d), "holder in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 75-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 75-3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under Section 75-3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

SOURCES: Former § 75-3-302: Codes, 1942, § 41A:3-302; Laws, 1966, ch. 316, § 3-302; Laws, 1992, ch. 420, § 28, eff from and after January 1, 1993.

Cross References — Rights of holder of consumer's note taken by dance studio to take free of consumer's defenses against dance studio, see § 75-81-109.

JUDICIAL DECISIONS

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64. Decisions under former Code 1942 § 101.

I. DECISIONS UNDER CURRENT LAW.

1. In general.

Admissions agreement between decedent and nursing home contained unconscionable provisions, and weaved unconscionable nonforum terms into the arbitration provision, Miss. Code Ann. § 75-2-302; were the court to assume the contract was valid, the contested agreement to arbitrate would be unenforceable, as the forum putatively agreed upon was unavailable. Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So. 3d 695 (Miss. 2009).

2. Holder in due course.

Where an assignee bought a note and deed of trust before defendant borrower filed suit alleging fraud by the funding lender, the assignee and plaintiff, its loan servicer, were holders in due course entitled to sue on the note under Miss. Code Ann. §§ 75-3-301, 75-3-302(a). Ocwen Loan Servicing, LLC v. Branaman, 554 F. Supp. 2d 645 (N.D. Miss. 2008).

3.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-302.

11. In general.

Mortgage company's assignment of the loans to the bank were valid and as such the bank was a holder in due course. Carson v. McNeal, 375 F. Supp. 2d 509 (S.D. Miss. 2005).

Bank became holder in due course of instrument when it took properly executed check from payee, for value, in good faith, and without notice that there was any defense against it or claim to it by any other person. People v. Lombardi, 13 Ill. App. 3d 754, 301 N.E.2d 70 (1st Dist. 1973).

A collecting bank may be a holder in due course when it takes an instrument for value, in good faith and without notice that it is overdue or has been dishonored or of any defense against it or claim to it on the part of any person. Central Bank & Trust Co. v. First Northwest Bank, 332 F. Supp. 1166 (E.D. Mo. 1971), aff'd, 458 F.2d 511 (8th Cir. Mo. 1972).

A bank's continuing status as a collecting agent does not prevent it from becoming a holder in due course if the bank satisfies the requirements of UCC § 3-302. Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968).

A holder through a holder in due course has all the rights of a holder in due course. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

The maker's defenses to the payment of a promissory note to the effect that the tractor, the purchase price of which was represented by the promissory note, was defective and was returned to the seller for repairs and thereafter seized in a suit filed against the seller by a finance company, were unavailable against the plaintiff bank which was a holder in due course of the paper. First Nat'l Bank v. Marcinkowska, 279 F. Supp. 251 (N.D. Miss. 1967).

Where a purchaser of negotiable securities through a broker has acquired the protected status of a holder in due course, the broker has complied with his contractual obligation of conveying good title to the buyer. White v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 90 N.J. Super. 565, 218 A.2d 655 (L. Div. 1966).

Whether or not one is a holder in due course does not depend upon his diligence or negligence. Securities Inv. Co. v. Cohen, 241 Miss. 549, 131 So. 2d 439 (1961).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. Garnett v. Associates Disct. Corp., 233 Miss. 849, 103 So. 2d 368 (1958).

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. American Book Co. v. White Sys. of Jackson, 223 Miss. 510, 78 So. 2d 582 (1955).

Where a check was genuine and was duly indorsed in blank by the payee named therein, and the check was negotiable even though in possession of a person not entitled thereto, an innocent purchaser for value becomes a holder in due course. Bruce v. State, 217 Miss. 368, 64 So. 2d 332 (1953).

Every holder is deemed prima facie to be a holder in due course subject to limitation that if negotiator's title was defective, the holder must prove that he, or his predecessor in title, acquired the title as holder in due course. Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952).

Checks do not become the property of the payee until there has been a valid delivery to it or to its agent or servant authorized to accept it, or something equivalent to delivery and acceptance, and therefore, where checks were delivered to the payee's agent, who was not authorized to accept them on behalf of the payee, the agent was accountable therefor to the maker, and could not be convicted of embezzlement from the payee upon his failure to deliver the checks to it. Reese v. State, 192 Miss. 147, 5 So. 2d 236 (1941).

Where title of one negotiating note was defective, holder had burden of proving they were holders in due course. Cassedy v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

There was no bad faith imputable to purchaser of trust deed and note because purchaser saw affidavit by makers that there was no infirmity. Guaranty Inv. & Loan Co. v. Stevens, 161 Miss. 473, 137 So. 335 (1931).

Where one negotiating loan charged usurious commission, purchaser of notes and trust deed and its assigned held to be holders in due course. Guaranty Inv. & Loan Co. v. Stevens, 161 Miss. 473, 137 So. 335 (1931).

One acquiring demand note for value without notice in reasonable time after execution held holder in due course. Wilson v. Stark, 146 Miss. 498, 112 So. 390 (1927).

That consideration of note is executory contract does not prevent one being holder in due course. Smith v. Ellis, 142 Miss. 444, 107 So. 669 (1926).

12. Scope.

Agreement to pay "within the next 60 days the sum of $5,000 from the jobs now under construction" did not contain an unconditional promise to pay and therefore was not a negotiable instrument.

Webb & Sons v. Hamilton, 30 A.D.2d 597 (3d Dep't 1968).

13. —Trade acceptances and letters of credit.

Bank issuing letter of credit may be enjoined from honoring demand for payment pursuant to UCC § 5-114 even where beneficiary of letter of credit took letter in good faith under UCC § 3-302 since § 302 protects one who takes draft or demand pursuant to letter of credit rather than beneficiary of letter of credit who issues demand. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

The purchaser of trade acceptances for value, before their due dates and in the regular course of business, and without notice of dishonor or any defenses, is a holder in due course within the meaning of this section. Equitable Disct. Corp. v. Fischer, 12 Pa. D. & C.2d 326 (1957).

14. Taking for value.

Bank which took note for value, in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. Worthey v. First State Bank, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

Allegations that company which was transferred in exchange for note had never made profit was not sufficient to establish that transfer of note was not for value within meaning of UCC § 3-302, since no facts were alleged relating to worth of company's assets, and allegations that holder of note required payment of substantial portion of note by transferor if maker defaulted, and further required that transferor's terms of transfer be concealed from maker, were insufficient to show that holder had "notice of fraud" within meaning of UCC § 1-201(25). Ritz v. Karstenson, 39 Ill. App. 3d 877, 350 N.E.2d 870 (2d Dist. 1976).

UCC § 4-208 provides for bank to acquire security interest in items presented for collection under certain circumstances; this security interest is considered to be "value" for purposes of becoming holder in due course of item, and if bank meets other requirements of UCC § 3-302 it can become holder in due course of "item and any accompanying documents or the proceeds of either." Commercial Disct. Corp. v. Milwaukee W. Bank, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

Indorsee of check drawn by insurer in settlement of claim for damage to automobile acquired for indorsee's use by gifts from his grandparents and as to which his mother was record title holder, did not take check "for value," either on theory that he had claim against insured for damage to car or personal property therein, or on theory that he intended to use amount of check for purchase of new car and made "irrevocable commitment to third person" therefor. Bennett v. United States Fid. & Guar. Co., 19 N.C. App. 66, 198 S.E.2d 33 (1973), cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Nothing in the Uniform Commercial Code abrogates holder in due course status predicated on whether the acceptance preceded or succeeded acquisition of title to a draft. F & M Nat'l Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

An employee given a note for his wages is not a holder in due course. Lukens v. Goit, 430 P.2d 607 (Wyo. 1967).

Where seller, in consideration of receipt of cashier's checks aggregating $600,000, made actual physical delivery of certificates evidencing all of his stock in a corporation in escrow to be delivered to the purchaser when the seller had been relieved of his bank guarantees without anything further to be done on his part, the transfer was irrevocable for the only remaining act to complete delivery was solely within the power of the purchaser; and such delivery in escrow constituted an "irrevocable commitment" as provided in clause (c) of § 3-303, and the seller had taken the cashier's checks for value and was a "holder in due course." Crest Fin. Co. v. First State Bank, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

15. —Satisfaction of antecedent debt. Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255 (5th Cir. 1982).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. Lipkowitz & Plaut v. Affrunti, 95 Misc. 2d 849 (1978).

Although antecedent claim may constitute value under UCC § 3-303(b), where no antecedent claim existed, holder of note (1) did not take instrument for value, (2) was not holder in due course under UCC § 3-302(1)(a), and (3) held note subject to defense of lack of consideration. Quazzo v. Quazzo, 136 Vt. 107, 386 A.2d 638 (1978).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. Lazere Fin. Corp. v. Crystal Mart, Inc., 78 Misc. 2d 379 (1974).

Attorneys who acquired note as payment for services performed by them for corporate payee could be holders in due course only to extent of amount of value of services performed; and in absence of evidence of value of such services, summary judgment for attorneys was error. Fernandez v. Cunningham,, 268 So. 2d 166 (Fla. App. 1972).

Bank which accepted a cashier's check in payment of an antecedent debt would have been a holder in due course where it acted in good faith and without notice that the debtor had committed a fraud in securing the money represented by the check. Nicklaus v. Peoples Bank & Trust Co., 258 F. Supp. 482 (E.D. Ark. 1965), aff'd, 369 F.2d 683 (8th Cir. Ark. 1966).

A bank accepting a forged check in payment of an antecedent debt in good faith and without notice of any infirmity in the instrument is a holder in due course. Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. Okla. 1964).

An attorney to whom promissory notes were transferred by his client as a portion of a retainer for services to be performed in the future, and in payment for certain prior legal services the value of which was not disclosed, is not a purchaser for value and cannot be a holder in due course of the notes. Korzenik v. Supreme Radio, Inc., 27 Mass. App. Dec. 25 (1963), aff'd, 347 Mass. 309, 197 N.E.2d 702 (1964).

16. —Receipt of deposit and payment of checks by bank.

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

Under both the Negotiable Instruments Law and the Uniform Commercial Code a bank which received a deposit of two checks and paid checks drawn by the depositor on the total amount of these checks was a holder for value of the two deposited checks, notwithstanding the fact that they were deposited with the usual bank deposit slip reciting that the item was received by the bank for collection only. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

17. —Other banking transactions.

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. GMAC v. General Accident Fire & Life Assurance Corp., 67 A.D.2d 316 (4th Dep't 1979).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof, alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee, defendant gave value for checks, as defined in UCC § 3-302, by surrendering security for employee's indebtedness. Richardson Co. v. First Nat'l Bank, 504 S.W.2d 812 (Tex. Civ. App. 1974), ref. n.r.e (Apr. 3, 1974).

Where the drawee of drafts maintained a checking account in a collector bank and made a check payable to the bank's order in purported payment of the drafts, which were stamped "paid" and surrendered to the drawee, delivery of the check constituted payment just as effectively as if cash had been given. The payment to the collecting bank was equivalent to payment of the owner of the instrument, a holder in due course. F & M Nat'l Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

Bank which permitted new president and sole stockholder of corporation to cash checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it permitted sole stockholder to cash rather than deposit to corporation's account. Maley v. East Side Bank, 361 F.2d 393 (7th Cir. Ill. 1966).

18. Good faith and notice, generally.

Bank issuing letter of credit may be enjoined from honoring demand for payment pursuant to UCC § 5-114 even where beneficiary of letter of credit took letter in good faith under UCC § 3-302 since § 302 protects one who takes draft or demand pursuant to letter of credit rather than beneficiary of letter of credit who issues demand. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

Bank which took note for value, in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. Worthey v. First State Bank, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

Definition of "good faith" as used in § 3-302(1) does not require that, in addition to being honest, holder must exercise due care. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Negligence goes to notice requirement for being a holder in due course and not to good faith requirement. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Nothing in Code definition of "good faith" suggests that, in addition to being honest, holder of negotiable instrument must exercise due care to be in good faith; and bank did act in good faith, and was holder in due course, although it failed to exercise ordinary care by violating its own rule of management when its teller cashed checks in question without managerial approval. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Assuming that notes were acquired by holder after learning from maker of alleged express agreement, not reflected on notes, that notes were not to be discounted, actual knowledge by holder as to alleged agreement, although it might have aroused suspicion, did not amount to lack of good faith in acquisition of notes. Factors & Note Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

19. —Particular applications.

A credit corporation did not meet the requirement that a holder in due course must take "in good faith," and "without notice ... of any defenses or claims on the part of any person" where the credit corporation and the seller of the equipment involved had interlocking directorates. Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15 (Miss. 1981).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defendant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank in accepting buyer's cashier's checks and dealing with proceeds thereof did not violate good faith requirement of UCC § 3-302(1)(b)-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) checks were valid cashier's checks that showed no sign of alteration or irregularity; (2) although transaction was restructured from what buyer had expected by bank's not becoming party to sale contract, buyer accepted such risk by turning over cashier's checks to owner-seller; (3) there was nothing inherently irregular or suspicious in bank's method of handling such checks and proceeds thereof; (4) bank was not aware of understanding between buyer and owner-seller and did not sign sale contract because bank had nothing to sell; and (5) both trial court's findings and record on appeal did not support buyer's contention that bank had failed to comply with definition of good faith in UCC § 1-201(19) by not being honest in fact in its conduct in sale transaction. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Where collecting bank had paid out money on forged check by permitting withdrawals from fictitious account, credit allowed for check in fictitious account had been withdrawn within meaning of § 4-208, so that collecting bank was holder for value. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where record contained no evidence tending to show that collecting bank in accepting forged check for deposit and permitting withdrawal of funds from fictitious account connived with forger or had any reason to believe that check was not genuine, there was no evidence tending to establish bank's lack of good faith, even if such conduct constituted failure to exercise ordinary care or even gross negligence. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Although the makers of notes had been induced to borrow money from the plaintiff bank by fraudulent representations of a bank officer, where those representations were not chargeable to the bank, the bank took the instruments as a holder in due course, subject only to the defense of fraud as to the nature of the instrument. City Nat'l Bank v. Vanderboom, 290 F. Supp. 592 (W.D. Ark. 1968), aff'd, 422 F.2d 221 (8th Cir. Ark. 1970), cert. denied, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970).

Where a bank accepted a check naming its depositor as payee and gave instant credit to the deposit by acceptance of a second check drawn by its depositor on its account with the bank in payment of a note simultaneously returned to the depositor, and the bank had taken the check in good faith without notice of any defense against it or claim to it on the part of any person, or without notice of dishonor; the bank was the holder in due course and had acquired a security interest in the check. Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968).

Transferee of negotiable note did not take in good faith and was not holder in due course, where transferee was finance company which was closely connected with dealer whose paper it bought, furnishing form of sale contract and note for use by dealer. American Plan Corp. v. Woods, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968).

Where a minor purchased an automobile from a friend, agreeing to give the latter a check as part payment, and the friend directed the minor to indorse and deliver the check to a motor company as down payment on an automobile for the friend, the motor company, having received the instrument by negotiation from the friend for value, in good faith, and without notice that it was overdue or had been dishonored or that there was any defense against it, was a subsequent holder in due course. The fact that the check was not manually transferred from the minor to the friend and then to the motor company was immaterial; constructive delivery being sufficient. Snyder v. Town Hill Motors, Inc., 193 Pa. Super. 578, 165 A.2d 293 (1960).

20. —Banking transactions.

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors, drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for $13,430 but check imprinter inadvertently entered "$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite $10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. McCook County Nat'l Bank v. Compton, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

21. — —Acceptance of checks on which payment is stopped.

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited check in his account at plaintiff depositary bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time, court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and (c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depositary bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. Frantz v. First Nat'l Bank, 584 P.2d 1125 (Alaska 1978).

In order for notice of defenses to disqualify party from becoming holder in due course under UCC § 3-302(1)(c), defenses must be against instrument itself. Thus, bank could recover on checks on which drawer had stopped payment where drawer had no defenses against checks at time bank became holder thereof because checks were regular on their face and represented bona fide transactions in which drawer had received all that he had bargained for. Community Bank v. Ell, 278 Or. 417, 564 P.2d 685 (1977), reh'g denied, 279 Or. 245, 566 P.2d 903 (1977).

Bank which issued a cashier's check to replace a personal check took the personal check in good faith and for value and was thus holder in due course under UCC §§ 3-302 and 3-303 where bank manager ascertained validity of check by telephone call to drawer's bank prior to drawer's placement of stop payment order on check. Manufacturers & Traders Trust Co. v. Murphy, 369 F. Supp. 11 (W.D. Pa. 1974), aff'd, 517 F.2d 1398 (3d Cir. Pa. 1975).

Where bank accepted check from its depositor, forwarded it for collection, drawer stopped payment on check and, during interval between deposit of check and notice of stop payment order, bank granted credit and made payment upon checks drawn by its customer, bank was holder in due course to extent of advances made to its depositor; fact that standard banking practice would have been to withhold payment on check until it had been collected was not sufficient to establish that bank did not exercise good faith in handling check. St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co., 302 Minn. 71, 224 N.W.2d 746 (1974).

Evidence that bank, in cashing 2 checks on which payment was later stopped, violated its own rule requiring teller to gain manager's approval before cashing corporate checks, was insufficient to establish that bank lacked good faith and therefore could not be a holder in due course. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Bank took check "in good faith" even though it credited depositor's account immediately so that depositor was able to draw against amount of check before drawer stopped payment thereon, where bank had no knowledge of drawer's claims against depositor. Exchange Nat'l Bank v. Beshara, 236 So. 2d 198 (Fla. App. 1970).

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

Bank which received defendant's checks from the payee for value and without notice of any infirmities became a holder in due course, and the fact that the drawer delivered the checks to the payee as a loan on a promise to give back cash the next day and who stopped payment on the checks on ground of failure of consideration resulting from payee's breach of his promise could not thereby defeat the rights of the bank. Texico State Bank v. Hullinger, 75 Ill. App. 2d 212, 220 N.E.2d 248 (4th Dist. 1966).

22. — —Acceptance of instruments without proper indorsement.

In a case involving deposits made by a customer into a trust and operating account during the commission of a fraud, a bank did not lose its holder in due course status, despite the varying endorsements made by the customer, pursuant to Miss. Code Ann. §§ 75-4-205(1), 75-3-302(a); the endorsements were not defective based on a failure to reference the customer's status as a trustee. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Bank which was authorized depositary of plaintiff company was liable for face amount of 17 third-party checks made payable to plaintiff which were indorsed without authority by plaintiff's manager and deposited in manager's personal account, since bank under UCC § 3-304(2) had notice of plaintiff's claim against checks as payee thereof and thus could not claim benefits of holder-in-due-course status under UCC § 3-302(1). Mott Grain Co. v. First Nat'l Bank & Trust Co., 259 N.W.2d 667 (N.D. 1977).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of set off against payee. United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596 (D. Md. 1973).

Where bookkeeper deposited third party checks payable to her employer in her personal bank account, defendant bank was not holder in due course, since it had notice of claim against instrument arising out of bookkeeper's acting for her own benefit, and since it was not a holder for value not having acquired the checks by authorized signature or indorsement. Von Gohren v. Pacific Nat'l Bank, 8 Wash. App. 245, 505 P.2d 467 (1973).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Draft payable to two payees was deposited by one without endorsement by other; held bank did not become "holder" of draft. Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341 (5th Cir. Fla. 1970).

23. — —Knowledge of underlying nature of conduct resulting in defenses.

In a case alleging predatory lending practices, a creditor was not liable for the alleged improprieties of a predecessor in interest because it was a holder in due course; there was uncontested evidence that the creditor purchased the rights to a promissory note for value, in good faith, and without notice of the impropriety. Stuckey v. Provident Bank, 912 So. 2d 859 (Miss. 2005).

Where bank loaned $25,000 to officer of corporation that was heavily indebted to bank and could not borrow such money itself, and where officer's note to bank for such sum, which was used by corporation, was executed allegedly because of fraudulent assurances by bank official that bank would not hold maker of note personally liable thereon but would instead look to corporation for payment, summary judgment on note in favor of bank would be reversed because defendant maker alleged sufficient facts to show (1) that bank was not holder in due course of such note under UCC § 3-302(1)(b), and (2) that bank therefore under UCC § 3-306(b) took note subject to all defenses of maker that would be available in action on simple contract, including defense of fraud in inducement. Thompson v. First Nat'l Bank & Trust Co., 142 Ga. App. 174, 235 S.E.2d 582 (1977), rev'd on other grounds, 240 Ga. 494, 241 S.E.2d 253 (1978).

Bank that took drafts drawn under letter of credit did not take drafts in good faith as defined by UCC § 1-201(19) and without notice, as defined in UCC § 1-201(25), of defenses against them, and thus bank did not qualify as holder in due course under UCC § 3-302(1), where, prior to time bank took draft, attorney gave bank notice by letter that letters of credit were issued pursuant to specific terms and conditions, conditions were explained, and letter warned that conditions had not and would not be fulfilled in foreseeable future; this constituted notice that any certification by beneficiary of letters of credit that payment was due thereunder might well be fraudulent; moreover, bank, having made substantial loans to beneficiary, could not have been unaware of beneficiary's severe financial difficulties. Shaffer v. Brooklyn Park Garden Apts., 311 Minn. 452, 250 N.W.2d 172 (1977).

Bank which sought to recover on checks on which payment had been stopped because of defendant drawer's defense (right of setoff against payee) that was good except as against holder in due course did not establish, as matter of law, that it took checks in good faith so as to be holder in due course under UCC § 3-302(1)(b), where (1) on date two of such checks were deposited by payee, who was plaintiff bank's customer, bank suspected that payee-customer was using business dealings with defendant drawer to kite numerous other checks given by payee-customer to drawer in the course of their dealings; (2) bank on such date commenced not paying payee-customer's checks until they were covered by sufficient funds; (3) bank had long allowed payee-customer to maintain large potential overdrafts in his account; (4) payee-customer's account consisted mainly of checks received from, and given to, defendant drawer of checks in suit; and (5) jury could have found that when bank accepted payee-customer's deposit of checks in suit, bank was attempting to place on defendant drawer probable loss from drawer's dealings with payee-customer, in which dealings bank had acquiesced. Community Bank v. Ell, 278 Or. 417, 564 P.2d 685 (1977), reh'g denied, 279 Or. 245, 566 P.2d 903 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned note to bank but failed to deliver equipment, bank was not holder in due course under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. Kaw Valley State Bank & Trust Co. v. Riddle, 219 Kan. 550, 549 P.2d 927 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employees of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555 (2d Dist. 1976).

Fact that, during period of rapidly expanding franchising, bank acquired as collateral for loans all notes of franchise company, which notes arose out of sale of franchises, that bank anticipated that loan would be for short-term working capital, that bank had knowledge that there was franchising arrangement between franchising company and makers of notes, that there might be accelerated payment of notes on sale of subfranchises by makers and that notes arose from franchising arrangement, did not justify inference of notice or bad faith as defined by UCC. Third Nat'l Bank v. Hardi-Gardens Supply of Ill. Inc., 380 F. Supp. 930 (M.D. Tenn. 1974).

Payee's depository bank had reason to know that drawer had defense against payee, considering that bank knew that payee was using checks drawn by drawer to cover other checks drawn for drawer's benefit, and this knowledge precluded holder in due course status under UCC § 3-302(1)(c). Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d 1331 (Okla. 1971).

24. — —Withdrawals while depositor's balance is low.

Where payee indorsed checks for deposit, deposited them in its account with bank, and bank thereafter allowed payee to withdraw funds from its account in full amount of checks, notice of fact that payee-depositor's account with bank was overdrawn when withdrawal was allowed would not result in bank's loss of its holder in due course status. Commerce Bank of Univ. City v. EDCO Fin. Servs., 379 F. Supp. 293 (E.D. Mo. 1974), aff'd, 503 F.2d 1047 (8th Cir. Mo. 1975).

That its depositor's account is low in funds, or even overdrawn, does not constitute notice to a collecting bank of an infirmity in the underlying transaction or instrument, and is not evidence of bad faith chargeable to it at the time it permitted withdrawals against the deposited check. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

25. —Instrument so irregular as to give notice of defense.

Assignee of note did not take instrument in good faith within meaning of UCC § 3-302(1)(b), and thus was subject to defenses of fraud and failure of consideration that were applicable to assignor, where evidence showed that (1) although note had face value of $3,000, assignor discounted it to assignee for $500, of which $244 was interest; (2) note was taken by assignee without recourse; and (3) other circumstances existed from which knowledge of improper manner in which assignor had conducted business transaction with defendant maker could be imputed to assignee. Security Cent. Nat'l Bank v. Williams, 52 Ohio App. 2d 175, 368 N.E.2d 1264 (1976).

Bank, as holder of promissory note executed pursuant to contract between payee of note and its corporate maker for sale of barley, was not holder in due course under UCC § 3-302(1) where bank was informed by president of corporate maker, prior to purchase of note, that payee had not yet performed contract, and where instrument was so irregular as to give notice of claim or defense under UCC § 3-304(1)(a); bank was therefore not entitled to cut off maker's underlying contract defense. First Nat'l Bank v. Otto Huber & Sons, 394 F. Supp. 1284 (D.S.D. 1975).

Fact that note is purchased for amount less than face value, or that unusually large discount is accepted, is not of itself sufficient to charge purchaser with notice of existing equities, unless consideration is merely nominal. United States Fin. Co. v. Jones, 285 Ala. 105, 229 So. 2d 495 (1969).

The payee of a promissory note who has knowledge that a transaction between note's maker and another included a grossly excessive cash sales price is not a holder in due course if the pretended sale was intended to cloak a usurious transaction. Mutual Home Dealers Corp. v. Alves, 23 A.D.2d 791 (2d Dep't 1965).

26. —Knowledge of irregularity of underlying transaction.

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCS 1703(b)), should have alerted assignee to possible irregularities in making of note. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

Where assignee of note knew of assignor's operations re underlying transaction, such knowledge might be considered by court on remand in determining whether assignee was acting in good faith so as to qualify as holder in due course. Kennard v. Reliance, Inc., 257 Md. 654, 264 A.2d 832 (1970).

If note is alleged and proven usurious on its face, result would be to show that holder was not holder in due course. Gray v. American Bank, 122 Ga. App. 442, 177 S.E.2d 207 (1970).

Holder in due course was entitled to recover full amount of check that was negotiated to holder as payment on existing indebtedness owed by payee to holder in good faith and without notice of maker's defense of want of consideration, even though holder may have acquired knowledge of maker's defense prior to depositing check. Kemp Motor Sales, Inc. v. Statham, 120 Ga. App. 515, 171 S.E.2d 389 (1969).

As the drawer of a trade acceptance is the other party to the underlying transaction it is apparent that he cannot be a holder in due course because he necessarily has knowledge of defenses arising from his breach of the contract. Program Aids Co. v. W. R. Bean & Son, Inc., 4 U.C.C. Rep. Serv. 210 (1967, NY Sup).

27. —Knowledge of agent or employee.

Where the agent of a payee corporation was also the corporation's president, general manager, and sole stockholder and had full knowledge of all the facts surrounding the debt owed by the payor to the corporation, such knowledge was imputed to the corporation and precluded it from being entitled to the status of a holder in due course. Dobbs-Maynard Co. v. Jumper, 388 So. 2d 879 (Miss. 1980).

Bank which received check from secretary of debtor corporation as payment for two notes that secretary believed to be corporation's obligations was not holder in due course of such check under UCC § 3-302(1) where bank officer, who received check, knew that one of the two notes was personal obligation of debtor corporation's president. Frye v. F & M Bank, 561 S.W.2d 392 (Mo. Ct. App. 1977).

Where bank took cashier's check from one of its tellers in payment of debt due from teller and where there was evidence from which it could be inferred that assistant cashier of bank took check with knowledge that personal check used by teller to purchase cashier's check was drawn on insufficient funds, bank took cashier's check with notice of its fraudulent procurement and in bad faith, and, thus, did not achieve status of holder in due course. Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569 (Mo. Ct. App. 1975).

Where agent with authority to gather and transmit information and to prepare drafts and obtain indorsements on them became aware, while acting in its capacity as plaintiff's agent, of special purpose for which bank indorsed draft, plaintiff was charged with notice that bank indorsed draft for special purpose, and could not therefore be holder in due course but took draft subject to bank's defense which could properly be asserted by parol evidence. American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 111 R.I. 415, 303 A.2d 121 (1973).

Although the makers of notes had been induced to borrow money from the plaintiff bank by fraudulent representations of a bank officer, where those representations were not chargeable to the bank, the bank took the instruments as a holder in due course, subject only to the defense of fraud as to the nature of the instrument. City Nat'l Bank v. Vanderboom, 290 F. Supp. 592 (W.D. Ark. 1968), aff'd, 422 F.2d 221 (8th Cir. Ark. 1970), cert. denied, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970).

The fact that a bank financing the sales of a vendor supplied the vendor with printed forms does not make the vendor the agent of the bank so as to impute to the bank the knowledge of the vendor as to defenses of the maker. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

28. —Past due instrument.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. Matter of Marriage of Rutherford (Civ. App. 1978) 573 S.W.2d 299.

One who takes assignment of note at time when it was past due and was on notice of such fact by virtue of terms of note, is not holder in due course. Wenke v. Norton, 120 Ga. App. 70, 169 S.E.2d 663 (1969).

A person who takes a note with notice that it is overdue is not a holder in due course, and a holder who obtains his title from a holder in due course cannot enforce the instrument when he was party to some fraud or illegality affecting it. Brown v. Scales, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

29. Effect of failure to make inquiry.

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

The fact that a holder does not inquire as to whether the underlying contract has been performed does not prevent him from being a holder in due course. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The standard of notice contemplated by subsection (1)(c) of the instant section is actual notice and not merely reasonable grounds for belief, and the purchaser of a negotiable note given by a home owner to an aluminum siding company would not be affected by evidence that the purchaser was aware of complaints against the siding company by previous customers nor by evidence of knowledge of a defense acquired after the note had been purchased. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

30. —Failure in circumstances calling for further inquiry.

In declaratory action to determine rights of holder of promissory note, where (1) maker of note on May 23, 1971 signed contract to purchase lot, received deed to lot, and executed mortgage on lot and note in certain sum payable to named person, which note was substantially discounted and immediately sold to plaintiff; (2) makes rescinded the voidable sales contract two days later, as permitted by federal Interstate Land Sales Full Disclosure Act (15 USCS § 1703(b)), because of his failure to receive property report on lot as of time of signing contract of sale; and (3) maker contended that plaintiff holder had had notice within meaning of UCC § 3-304(1)(b) that maker's obligation under such contract was voidable, plaintiff holder was not holder in due course under UCC § 3-302(1)(c) because (1) plaintiff's purchase of note for much less than its full value should have alerted him to possible defense against maker's liability; (2) note was also purchased by plaintiff within the two-day period in which maker could rescind the voidable sales contract; (3) by examining such contract, which was in possession of seller of note, plaintiff could have ascertained that maker of note had not inspected the lot purchased or received a property report thereon, as required by federal law; and (4) under circumstances of case, trial court could reasonably infer bad faith on part of plaintiff in refusing to investigate when facts known to him indicated irregularity respecting such note. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

Notice under UCC § 3-302(1)(c) and UCC § 3-304(1)(b) requires some inquiry by purchaser of note where purchaser has actual knowledge of facts that should alert him to possible irregularities concerning such note. Protection afforded holder in due course cannot be used to shield one who simply refuses to investigate when facts known to him suggest an irregularity concerning commercial paper that he purchases. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

One who seeks protection as a holder in due course must have dealt fairly and honestly in acquiring the instrument as to the rights of prior parties, and where circumstances are such as to justify the conclusion that the failure to make inquiry arose from the suspicion that inquiry would disclose a vice or defect in the title, the person is not a holder in due course. Norman v. World Wide Distribs., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963).

Where the evidence showed that the payee of certain notes operated a referral plan which was a fraudulent scheme based on an operation similar to the chain letter racket, and that the holder, which had paid $831 for a $1,079.40 note payable three days after date, knew enough about the referral plan to require it to make further inquiry, the holder, having made no inquiry, held as though it had knowledge of all that the inquiry would have revealed, and was not a holder in due course. Norman v. World Wide Distribs., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963).

31. Payee as holder in due course, generally.

A holder through a holder in due course has all the rights of a holder in due course. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

When there is no valid defense against the payee, the fact that he is only a holder and not a holder in due course is immaterial. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

A payee may be a holder in due course. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Indorsee who surrendered possession of dishonored checks to his indorser cannot be regarded as a "holder" of the instruments. Dluge v. Robinson, 204 Pa. Super. 404, 204 A.2d 279 (1964).

There is no doubt that under the Uniform Commercial Code, the payee of a series of promissory notes may be a holder in due course. Mellen v. Gora, 70 York Leg. Rec. 1 (Pa. 1956).

32. —Particular applications.

Bank issuing letter of credit may be enjoined against making payment upon demand under UCC § 5-114 where there is "fraud in transaction" and party presenting draft is beneficiary or some other party who is not holder in due course under UCC § 3-302. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

Payee of cashier's check upon which issuing bank had attempted to stop payment for lack of consideration was entitled to recover amount of check from issuer; recovery based not on payee's status as holder in due course, but on nature of cashier's check as being accepted for payment when issued, within the meaning of UCC § 4-303(a). Able & Assocs. v. Orchard Hill Farms, Inc., 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1st Dist. 1979).

Where delivery of check was conditioned on its acceptance as settlement of note held by payee, and where payee did not deposit check for 11 months, proffered settlement was not accepted within reasonable time and check in question was subject to defense based on its conditional delivery and good against any person not holder in due course under UCC § 3-306(3); payee was not holder in due course under UCC § 3-302 in that his own conversation with plaintiff preceding delivery of check, together with notation on check, were ample evidence that payee had actual notice of drawer's defense. Losson v. Whitson, 535 S.W.2d 406 (Tex. Civ. App. 1976).

Payee of four checks was holder in due course and was entitled to recover from drawer of checks under UCC §§ 3-302-3-305 where checks were given to payee in payment for grain shipments by owner of feed and grocery business located on drawer's property, under arrangement whereby drawer furnished money to store owner to buy feed and was given proceeds from resale of grain and right to purchase grain at cost, and where payee had been given approximately 70 checks signed by drawer as payment for grain shipments over past two years. S & C Transp. Co. v. McAlister, 528 P.2d 1140 (Okla. Ct. App. 1974).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. Lazere Fin. Corp. v. Crystal Mart, Inc., 78 Misc. 2d 379 (1974).

Where (1) bank check was delivered to payee by drawer's agent with drawer's consent and knowledge, (2) check itself contained no restrictions or designations as to its use, and (3) payee, stock brokerage firm, had no trading account with, or indebtedness to, drawer, payee took check without notice of drawer's claims, payee became holder in due course of instrument, and was entitled to summary judgment in action by drawer. Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 207 N.W.2d 282 (1973).

Plaintiff had notice of defense on note so as to preclude holder in due course status where plaintiff participated in underlying financing arrangement under which notes of which plaintiff was payee were assigned to defendant which executed mortgage to secure note so that plaintiff could receive money from mortgagee and plaintiff ultimately paid mortgagee and obtained assignment of notes and mortgage. Coplan Pipe & Supply Co. v. Ben-Frieda Corp., 256 So. 2d 218 (Fla. App. 1972).

Where the defendant executed a promissory note on February 10, 1964 and subsequently on April 15, 1964 incorporated his construction business, plaintiff who was the holder, but not a holder in due course, of the note was subject to the defense of novation, and proof of that defense was not precluded by the parol evidence rule or the Statute of Frauds. Miles v. Houghtaling, 32 A.D.2d 714 (3d Dep't 1969).

The Code does not displace a statute which declares that the transferee of the buyer's note given as part of a credit sale transaction shall not have the protection from defenses of a holder in due course. Casey v. Philadelphia Auto Sales Co., 428 Pa. 155, 236 A.2d 800 (1968).

Where insurer, after agreeing to pay in full plaintiff buyer's claim that a certain shipment of goods had been damaged in transit, took possession of the goods and sold them at auction to defendant which executed three promissory notes to plaintiff in partial payment therefor, plaintiff, who had no notice of any fact indicating that chicanery had been practiced upon defendant in connection with the sale, was a holder in due course of the notes and entitled to recover thereon despite defendant's claim of fraudulent substitution of goods. Saale v. Interstate Steel Co., 27 A.D.2d 1 (1st Dep't 1966), aff'd, 19 N.Y.2d 933, 281 N.Y.S.2d 340, 228 N.E.2d 397 (1967).

The payee of a promissory note who has knowledge that a transaction between note's maker and another included a grossly excessive cash sales price is not a holder in due course if the pretended sale was intended to cloak a usurious transaction. Mutual Home Dealers Corp. v. Alves, 23 A.D.2d 791 (2d Dep't 1965).

33. Purchaser at judicial sale.

One with the rights of a holder in due course of a promissory note, who has not otherwise lost such rights, does not diminish his status by purchasing the note later at a judicial sale, although he may not by virtue of such purchase alone become a due course holder. Finance Co. of Am. v. Wilson, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

34. Acquisition in taking over estate.

Status of holder in due course cannot be acquired simply by virtue of taking over as administratrix of decedent's estate, since representative of estate is not purchaser for value before maturity without notice and hence can acquire no greater rights than those possessed by decedent during lifetime. Rago v. Cosmopolitan Nat'l Bank, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

35. Bulk transactions.

Under UCC § 3-302(3)(c), Federal Deposit Insurance Corp. (FDIC), on making bulk purchase of part of assets of bank closed by commissioner of banking, was not holder in due course of promissory note included in such purchase, since such a transaction does not possess the characteristics of a sale for value, in good faith, and without notice of any defense of note's maker to liability thereon (observing that Official Comment 3 to 3-302(3)(c) states that such subsection has particular application to purchase by one bank of a substantial part of the commercial paper held by another bank which is threatened with insolvency and seeks to liquidate its assets). Henkin, Inc. v. Berea Bank & Trust Co., 566 S.W.2d 420 (Ky. Ct. App. 1978).

When there has been a bulk transfer incident to the liquidation of a going enterprise, or a transfer of a business of which certain promissory notes in issue represent part of the assets transferred, or a transfer by way of gift, then the transferee acquires no more protected interest than the payee had; but when, in the course of an ongoing business interest there is a substantial transfer of notes as a matter of regular commercial dealing, the purchaser is not put on notice that the paper transferred is not fully and freely negotiable. Pugatch v. David's Jewelers, 53 Misc. 2d 327 (1967).

The fact that a holder has financed the vendor's sales in some 500 to 600 transactions and had heard of 3 to 4 complaints of customers is immaterial both because the percentage is so small and also because the character of a holder is affected only by his knowledge with respect to the instrument in question and not other transactions. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The plaintiff's purchase of four accounts of the face value of $1187.25 for $635 from a paint dealer constituted a bulk transaction not in the regular course of business of the transferor, and plaintiff did not thereby become a holder in due course of defendant's trade acceptance which was included in the purchase; and where the proof showed that the defendant did not receive the goods for which the trade acceptance was executed there was a failure of consideration which barred plaintiff's recovery. Credit Indus. Corp. v. DiNanno, 29 Mass. App. Dec. 40 (1964).

36. Purchaser of limited interest.

Holder of limited interest in instrument is not confined to one with collateral security interest therein as opposed to equity ownership; purchaser of partial interest in promissory note is holder of to extent of interest purchased. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

In bank's suit on promissory note, fact that bank was copayee of note together with corporation form which bank purchased note for valuable consideration did not, under UCC § 3-302(2), destroy bank's status as holder in due course of such note. Ricks v. Bank of Dixie, 352 So. 2d 798 (Miss. 1977).

The pledgee of promissory notes to secure a debt is the purchaser of a limited interest under § 3-302(4), and not the holder of a limited assignment under § 3-202(3). Wood v. Willman, 423 P.2d 82 (Wyo. 1967).

A pledgee of notes is a purchaser of a limited interest and a holder in due course only to the extent of the interest purchased, but he could enforce the notes over defenses only to the extent of his interest, and defenses good against the pledgor remained available insofar as the pledgor retained an interest in the notes. Wood v. Willman, 423 P.2d 82 (Wyo. 1967).

When there has been a bulk transfer incident to the liquidation of a going enterprise, or a transfer of a business of which certain promissory notes in issue represent part of the assets transferred, or a transfer by way of gift, then the transferee acquires no more protected interest than the payee had; but when, in the course of an ongoing business interest there is a substantial transfer of notes as a matter of regular commercial dealing, the purchaser is not put on notice that the paper transferred is not fully and freely negotiable. Pugatch v. David's Jewelers, 53 Misc. 2d 327 (1967).

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37. Evidence and burden of proof.

In suit by guardian of three minors against bank for accepting, by assignment, four certificates of deposit owned by minors as collateral for bank's loan to guardian and guardian's husband individually and then appropriating proceeds of certificates to its own use, bank could not successfully claim that it was holder in due course under UCC § 3-302(1)(c) where it was unable to show that it had had no notice of any claim by any person to such certificates. First Nat'l Bank v. Rapides Bank & Trust Co., 145 Ga. App. 514, 244 S.E.2d 51 (1978), overruled on other grounds, 228 Ga. App. 893, 495 S.E.2d 296 (1997).

In action by holder, not in due course, against maker of promissory note, parole evidence was admissible to show that maker was induced to sign note by false and fraudulent representations of original payee. Berry v. Abilene Sav. Ass'n, 513 S.W.2d 872 (Tex. Civ. App. 1974), writ ref'd n.r.e., (Nov. 27, 1974).

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. Viracola v. Dallas Int'l Bank, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

Evidence supported conclusion that plaintiff was "beneficial owner" of cashier's check as well as holder in due course, where although he was neither payee nor endorsee of cashier's check or personal check which was consideration for cashier's check, he had paid insurance company payee of both checks full amount of notes issued to insurance company by drawer of personal check and surrendered notes to drawer of personal check, and he requested that cashier's check be made payable to insurance company for deposit only to bank whereupon cashier's check was immediately deposited in plaintiff's agency account. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

A bank which took a promissory note given for the installation of 12 jalousie windows was a holder in due course even though it failed to inquire of either the payee or the maker as to the satisfactory completion of the contract, where no evidence was adduced to show that the bank's failure to make such inquiry was a divergence from common banking or commercial practice. First Nat'l Bank v. Anderson, 7 Pa. D. & C.2d 661 (1956).

The defendant must show what knowledge the plaintiff had in order to establish that the plaintiff is not a holder in due course [although note that this is inconsistent with the provision that when a defense is shown to exist the burden is on the plaintiff to establish that he has the rights of a holder in due course. § 3-307(3)]. Potter Bank & Trust Co. v. Henneforth, 74 Montg. County L. Rep. 420 (Pa. 1959).

38. Issues for determination by jury.

Question whether holder of note was holder in due course was one of fact to be determined by trier of facts. Vernon v. Yanks, 303 So. 2d 375 (Fla. App. 1974).

In an action upon a check issued in payment for carpeting and floor tile installed by plaintiff in defendant's residence, where the defendant counterclaimed for breach of warranty based upon work not encompassed by the check, it was obvious that plaintiff was not a holder in due course and the jury should have been permitted to consider defenses to the check based upon the original transaction. Mansion Carpets, Inc. v. Marinoff, 24 A.D.2d 947 (1st Dep't 1965).

Ordinarily, the question whether one is a holder in due course under the requirements of this section is largely one of fact which, together with the credibility of those seeking to establish due course status, is for the jury. Budget Charge Accounts, Inc. v. Mullaney, 187 Pa. Super. 190, 144 A.2d 438 (1958).

Where there was a jury question whether a note was negotiated for the purpose of cutting off a defense of fraud in the inception, thus affecting the good faith of the holder, who claimed the status of a holder in due course, there was no error in opening a judgment entered by confession on the note. Budget Charge Accounts, Inc. v. Mullaney, 187 Pa. Super. 190, 144 A.2d 438 (1958).

A jury question regarding the good faith of a holder of a series of promissory notes was raised when the defendant alleged in his answer that the holder was present during and participated in the business transactions which were the source of the notes, that the holder personally signed one of the agreements executed during the transactions, and that the holder had prior knowledge of the infirmities inherent in the notes; consequently, the plaintiff-holder's motion for judgment on the pleadings would be denied. Mellen v. Gora, 70 York Leg. Rec. 1 (Pa. 1956).

39. Miscellaneous defenses.

In suit by purchaser of promissory note to recover thereon, where note was executed in favor of bank by defendants husband and wife as comakers together with defendant husband's partner and partner's wife to consolidate partnership's outstanding notes; where defendant's partner and partner's wife, who were not parties to suit, executed mortgage to bank on two parcels of realty owned by them as security for such note; where first parcel was subject to prior mortgage of third party and judgment of foreclosure had been entered thereon; where plaintiff at suggestion of partner's wife became sole owner of first parcel by redeeming it and having it conveyed to her by means of a "straw" transaction; where plaintiff found buyer for first parcel, buyer's title search discovered bank's mortgage thereon and note for which such mortgage was given, plaintiff purchased note in order to convey marketable title to buyer, note was indorsed by bank to plaintiff, mortgage on first parcel was released and discharged, mortgage on second parcel was assigned to plaintiff, and plaintiff sold first parcel for substantial profit, (1) under UCC § 3-302, plaintiff was holder in due course of note in suit and could recover thereon unless defendants could establish defense to note; (2) only defense raised by defendants was alleged satisfaction of such note on theory that plaintiff had been made whole by virtue of her resale of collateral property (first parcel); and (3) such defense failed since defendants, although benefiting from proceeds of note to extent of their interest in partnership, had never had any title or interest in the collateral property (first parcel), were not subjected in any way to double liability on note, and their liability thereon would be completely discharged under UCC § 3-603 by paying note (stating that any further dispute about liability in the case would have to be settled in separate action). Ryan v. Stearns, 135 Vt. 385, 376 A.2d 728 (1977), but see Licursi v. Sweeney, 156 Vt. 418, 594 A.2d 396 (1991).

Where (1) first bank, which had loaned debtor $20,000 and accepted as collateral nonnegotiable certificate of deposit that first bank had previously issued to debtor, inadvertently delivered renewal certificate to debtor, (2) debtor, instead of returning renewal certificate to first bank, used it as collateral for loan from second bank and gave second bank security interest in renewal certificate that second bank perfected by possession under UCC § 9-304(1), and (3) on debtor's default on both loans, second bank presented renewal certificate to first bank, which dishonored it, court held (1) that second bank was not holder in due course under UCC §§ 3-302(1) and 3-805 because renewal certificate was nonnegotiable under UCC § 3-104(1)(d), (2) that as a result, second bank was mere assignee of renewal certificate and certificate under assignments statute was subject to first bank's right of setoff,

(3) that exclusion of right of setoff from Article 9 protection means that claimant of right of setoff (first bank) against collateral (renewal certificate) is not barred from enforcing such right merely because another creditor (second bank) has perfected security interest in collateral by taking possession thereof, since right of setoff is separate from priority provisions of Article 9, and (4) that as a result, second bank held debtor's renewal certificate subject to any defenses of first bank, which "defenses" included first bank's right of setoff. Bank of Crystal Springs v. First Nat'l Bank, 427 So. 2d 968 (Miss. 1983).

Holder in due course of negotiable note secured by mortgage takes mortgage subject to only those defenses which could be raised by mortgagor against note itself. Colburn v. Mid-State Homes, Inc., 289 Ala. 255, 266 So. 2d 865 (1972).

If note is alleged and proven usurious on its face, result would be to show that holder was not holder in due course. Gray v. American Bank, 122 Ga. App. 442, 177 S.E.2d 207 (1970).

III. DECISIONS UNDER FORMER UCC § 75-3-305.

40. In general.

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited check in his account at plaintiff depositary bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time, court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and (c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depositary bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. Frantz v. First Nat'l Bank, 584 P.2d 1125 (Alaska 1978).

Under UCC §§ 3-305 and 3-306, agreement that any renewal note would be endorsed by all original endorsers, if proved, would make note unenforceable against guarantors, where delivery was conditional upon the procurement of all such endorsements. Long Island Trust Co. v. International Inst. for Packaging Educ., Ltd., 38 N.Y.2d 493, 344 N.E.2d 377 (1976).

When an oral agreement is not binding it cannot be raised as a defense to an action on a note. Sholom & Zuckerbrot Queens Leasing Corp. v. Forate Realty Corp., 29 A.D.2d 571 (2d Dep't 1967).

Acceptor's asserted defense of breach of contract is unavailable against the holder in due course of negotiable trade acceptance. Federal Factors, Inc. v. Wellbanke, 241 Ark. 44, 406 S.W.2d 712 (1966).

Makers of promissory notes possessing both the knowledge and opportunity to ascertain their provisions cannot procure the cancellation of the instruments when they have passed into the hands of a holder in due course. Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964).

The test of a defense under paragraph (c) of subdivision (1) of this section is that the party must have had no reasonable opportunity to obtain knowledge; and in determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education, and business experience, his ability to read or understand English, the representations made to him and his reason for relying on them or have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to him, and the apparent necessity, or lack of it for acting without delay. Reading Trust Co. v. Hutchison, 35 Pa. D. & C.2d 790 (1964).

41. Claims to instrument by others.

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255 (5th Cir. 1982).

Although bank that issued cashier's check to individual who subsequently became bankrupt had no "defense" to instrument within meaning of UCC §§ 3-305(2) and 3-306(c), based on fact that bankrupt had guaranteed certain notes held by bank, this did not preclude bank from setting-off guaranty obligations of bankrupt against amount of cashier's check in action by receiver of bankrupt's estate to collect on cashier's check. In re Johnson, 552 F.2d 1072 (4th Cir. Va. 1977).

42. Defenses of party to instrument with whom holder has not dealt.

Under UCC § 3-305(2), a holder in due course takes the instrument subject to all defenses of any party with whom he has dealt. Brannon v. Langston, 375 So. 2d 231 (Miss. 1979).

Third party who deals with agent exercising special authority to execute instrument by and in name of principal deals, within contemplation of UCC § 3-305(2), with principal himself. Estate of Lucas v. Whiteley, 550 S.W.2d 767 (Tex. Civ. App. 1977), ref. n.r.e. (Oct. 5, 1977).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. Chicago Title & Trust Co. v. Walsh, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

43. Want or failure of consideration.

Bank which took note for value in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. Worthey v. First State Bank, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also counterclaimed for damages for such fraud). Kreutz v. Wolff, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Payee of check drawn on account of defendant company for labor and materials allegedly furnished to defendant by payee, which check was dishonored by drawee bank for insufficient funds, was not entitled to summary judgment in action to recover on check where defendant's defense was that such labor and materials were actually furnished to another company with similar name which also had same person as its president. Plaintiff payee, who was not holder in due course, was subject under UCC § 3-305(2) to any defense that defendant might make, since he had dealt with defendant; and although fact that defendant's defense was made in affidavit by person who was president of both companies might make such defense appear to be evasive, defense still created factual issue that was central to issue sued on, since there would be no consideration to support check if defendant had never dealt with plaintiff for purchase of such labor and materials. Davis Acoustical Corp. v. Matzen Constr., Inc., 57 A.D.2d 1018 (3d Dep't 1977).

In action by United States to enforce payment of money orders delivered to United States as payee to satisfy taxpayer's tax liability, against bank that issued money orders, United States was holder in due course and, thus, was not subject to defense of failure of consideration where bank issued money orders against check which had not cleared, where money orders were delivered to taxpayer who, although they were intended to be used to meet taxpayer's payroll, delivered them to United States to satisfy his tax liability, and where purchaser of money orders subsequently stopped payment on his check. United States v. Second Nat'l Bank, 502 F.2d 535 (5th Cir. Fla. 1974), cert. denied, 421 U.S. 912, 95 S. Ct. 1567, 43 L. Ed. 2d 777 (1975).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc., 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Where the defendant dealt with the holder in due course, the holder in due course is subject to the defenses that the consideration he was to give had failed, as it is only a failure of consideration with respect to a third person which is a limited defense under the Code. Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968).

When the holder in due course is the indorsee of the defendant indorser, the indorser may raise against the holder in due course the defense of absence or lack of consideration because a defendant may always raise any defense which he has when sued by his indorsee which defense he has against such indorsee. Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968).

Failure of consideration cannot be raised against a holder in due course. National State Bank v. Kleinberg, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup); New York Plumbers Specialties Co. v. Valco Homes, Inc., 4 U.C.C. Rep. Serv. 587 (1967, NY Sup).

The defense of an unsatisfied condition upon which the paper was delivered is not a defense available against a holder in due course. National State Bank v. Kleinberg, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

Where the buyer's note did not recite the consideration for which it was given, it may be shown that he was the purchaser under a freezer and food contract and that the details of the transaction were such that it was reasonable to conclude that the freezer aspect and the food aspect of the transaction were not severable so that a defense of failure of consideration as to either aspect could be raised by the buyer-maker against an ordinary holder of his note. Continental Supermarket Food Serv., Inc. v. Soboski, 210 Pa. Super. 304, 232 A.2d 216 (1967).

Under the Code the lack of consideration is now a matter of defense as contrasted with the former NIL under which a presumption arose that an instrument was given for consideration. Minner v. Childs, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

A buyer may in the execution of a retail instalment contract waive, as against an assignee, any defenses except those enumerated in §§ 3-305(2) and 9-206(2), and as against the assignee of such a contract the buyer's alleged defenses of failure of consideration and subsequent promise and failure to repair the automobile which was the subject of the contract having been specifically waived in the instrument itself are unavailing. First Nat'l Bank v. Husted, 57 Ill. App. 2d 227, 205 N.E.2d 780 (2d Dist. 1965).

The test of a defense under paragraph (c) of subdivision (1) of this section is that the party must have had no reasonable opportunity to obtain knowledge; and in determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education, and business experience, his ability to read or understand English, the representations made to him and his reason for relying on them or have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to him, and the apparent necessity, or lack of it for acting without delay. Reading Trust Co. v. Hutchison, 35 Pa. D. & C.2d 790 (1964).

44. Incapacity of party.

Under UCC § 3-305(2)(b), estate of mental incompetent could avoid liability on promissory note where (1) incompetent's name had been affixed to note pursuant to power of attorney signed by incompetent during his incompetency and (2) plaintiff holders of note had dealt, although in good faith, with incompetent. Estate of Lucas v. Whiteley, 550 S.W.2d 767 (Tex. Civ. App. 1977), ref. n.r.e. (Oct. 5, 1977).

Testimony of physical distress, debility or pain will not support inference of mental incapacity unless so severe as to render person unable to comprehend nature of his act and its consequences. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

45. Duress.

Under Uniform Commercial Code, defense of duress enjoys an even higher status than defense of lack of consideration. This is because under UCC § 3-305(2)(b), if effect of duress is to make obligation void, defense is not cut off, even by holder in due course (holding that party suing on note, who was not holder in due course, was subject to defense of duress as defense available in action on simple contract). Quazzo v. Quazzo, 136 Vt. 107, 386 A.2d 638 (1978).

In action by homeowner whose promissory note and mortgage were assigned to defendant by contractor and who was threatened with foreclosure when he refused to make further payments until job was completed, constitutional attack on defendant's rights as holder in due course under UCC § 3-305 on ground that statute denied hearing to debtors on underlying validity and acceptable performance of initial contractual obligations was rejected. Hardy v. Gissendaner, 369 F. Supp. 481 (M.D. Ala. 1974), aff'd, 508 F.2d 1207 (5th Cir. Ala. 1975).

46. Illegality of transaction.

Drawer of check given to pay gambling debt that was legal where incurred was not liable on check since gambling debts owed to a "for-profit" gambling business were unenforceable in forum state and, even if plaintiff-casino was holder in due course, under UCC § 3-305(2) it did not take instrument free of defenses of party to instrument with whom it had dealt. Condado Aruba Caribbean Hotel v. Tickel, 39 Colo. App. 51, 561 P.2d 23 (1977).

Regardless of whether payee's misrepresentations were sufficient to render him guilty of theft by deception, defenses under UCC § 3-305 of illegality and fraudulent misrepresentation were unavailable against bank, as holder-in-due-course of check, where drawer entered into home improvement contract with and gave check to payee upon payee's false representation that he had already purchased materials, where bank cashed check that same day, and where drawer subsequently stopped payment after discovering that no materials had been purchased. Citizens Nat'l Bank v. Brazil, 141 Ga. App. 388, 233 S.E.2d 482 (1977).

Defense that promissory note executed by defendant for purchase of carpet was illegal in that seller of carpet obtained note in violation of injunction not to engage in certain selling procedures was personal defense and, under UCC § 3-305(2)(b), not available against holder in due course who had no knowledge or notice of injunction. New Jersey Mtg. & Inv. Corp. v. Berenyi, 140 N.J. Super. 406, 356 A.2d 421 (App. Div. 1976).

Seller of tires who accepted therefor indorsed payroll check made out to another did not incur injury or damage by accepting check since accepting party was holder in due course, having given value, in good faith and without notice of any claim to instrument on part of any person; theft is not defense against such holder in due course. Watkins v. Sheriff of Clark County, 85 Nev. 246, 453 P.2d 611 (1969).

Under an Arkansas statute making contracts entered into in that state by an unregistered foreign corporation unenforceable, promissory notes executed by a resident to an unregistered foreign corporation as payee in connection with the purchase of merchandise were void ab initio, and the bank to which the notes were assigned was not a holder in due course, and the maker was not liable thereon. Pacific Nat'l Bank v. Hernreich, 240 Ark. 114, 398 S.W.2d 221 (1966).

A note signed as part of an illegal contract transaction, is tainted with illegality, and unenforceable, and an assignee of the note takes it subject to whatever defenses the maker would have against the payee. Valley Bank & Trust Co. v. Sciartelli, 38 Mass. App. Dec. 141 (1967).

47. Misrepresentation or fraud, generally.

Fraud in the essence, or fraud in the factum, is effective as a defense against a holder in due course under this section. First Nat'l Bank v. Anderson, 7 Pa. D. & C.2d 661 (1956).

48. —Standards for determination.

Test of the defense of misrepresentation authorized by UCC § 3-305(2)(c) is whether there was excusable ignorance of the contents of the writing signed. The party signing it must not only have been ignorant of its contents, but must also have had no reasonable opportunity to obtain knowledge thereof. In determining what is a reasonable opportunity to obtain knowledge; all relevant factors must be taken into account, including the age and sex of the party signing; his intelligence, education, and business experience; his ability to read or to understand English; the representations made to him and his reason for relying on them or having confidence in the person who made them; the presence or absence of any third person who might have read or explained to the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of necessity, for acting without delay. Unless the misrepresentation meets this test, the defense is cut off by a holder in due course. Ricks v. Bank of Dixie, 352 So. 2d 798 (Miss. 1977).

Where bank purchased for valuable consideration note payable to bank and transferor of note as copayees, note was properly negotiated, and bank became holder of note in due course, trial court did not err in granting peremptory instruction for bank in bank's suit on note where maker's defense of misrepresentation under UCC § 3-305(2)(c) was supported only by evidence which showed that although maker was experienced businessman with college education, he failed to use ordinary care when he signed note without reading it on assumption that it was mere verification of terms of purchase order. In such case, maker's claim of misrepresentation had no legal substance. Ricks v. Bank of Dixie, 352 So. 2d 798 (Miss. 1977).

In determining whether fraud has been practiced in the inception of a note, a number of factors should be taken into account, including the age and sex of the maker, his intelligence, education and business experience, his ability to read or understand English, representations made to him and his reason to rely on them or have confidence in the person making them, the presence or absence of any third party who might read or explain it to him, and the apparent necessity or lack of it for acting without delay. First Nat'l Bank v. Anderson, 7 Pa. D. & C.2d 661 (1956).

Where the three makers of a promissory note signed it in turn, without reading it or having it read, or seeking information from others present regarding it, and the payee's agent did not refuse to allow the makers to do any of these things, they could not, in relying on a defense of fraud in the inception, assert that they failed to understand the contract which they signed, even though one of the makers had little formal education and another found the print too fine for her to read, and the payee's agent was talking during the execution of the note. First Nat'l Bank v. Anderson, 7 Pa. D. & C.2d 661 (1956).

49. —Misrepresentation as to nature of instrument.

The fact that the maker of a note may not have known that he was signing a note because he failed to read it does not constitute fraud as to the nature of the instrument particularly where the instrument was clearly titled. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Provisions in this section under which lack of consideration and fraud may not be availed of against a holder in due course replace §§ 54, 94, and 96 of the former Negotiable Instruments Law, under which the "fraud" which the maker of an instrument could raise by way of defense even against a holder in due course was only fraud in the essence or "in the factum", as, for example, where the maker signs a negotiable instrument in belief that it was some other document, not where he was induced to sign by misrepresentation as to fact of liability to the payee. Meadow Brook Nat'l Bank v. Rogers, 44 Misc. 2d 250 (1964).

The concept of fraud as to the nature of the instrument involves an element of tort which requires an examination into the precise manner and mode in which the party was deceived and his actual knowledge at the time of the signing. Bancredit, Inc. v. Bethea, 68 N.J. Super. 62, 172 A.2d 10 (App. Div. 1961).

In New Jersey Mortg. & Invest. Co. v. Dorsey (1960) 60 NJ Super 299, 158 A2d 712, affd 33 NJ 448, 165 A2d 297, the court stated with respect to the prior law that the defense of fraud as to the nature of an instrument is based upon the concept that there is no contract because of the fraud; but the court qualified this by saying "provided the maker was not negligent in failing to ascertain the actual character of the instrument," and, after citing of cases, "compare UCC § 3-305(2)(c), Id comment 7." New Jersey Mtg. & Inv. Co. v. Dorsey, 60 N.J. Super. 299, 158 A.2d 712 (1960), aff'd, 33 N.J. 448, 165 A.2d 297 (1960).

The fact that a seller of roofing materials induced the purchaser to execute trade acceptances in payment thereof upon the representation that they were in the nature of a note which would be put through a bank did not constitute a defense to the purchaser, who had cancelled the order for the materials, as against a holder in due course of such trade acceptances, since the circumstances did not show that the maker was induced to sign the acceptances by misrepresentations with neither knowledge nor a reasonable opportunity to obtain knowledge of their character or essential terms. Equitable Disct. Corp. v. Fischer, 12 Pa. D. & C.2d 326 (1957).

50. —Misrepresentation as to other matters.

Where guarantor of promissory note attempts to assert defense of fraud in inducement, rights of purchasers of limited interest in note cannot be defeated on ground that they breached duty to inquire and thus failed to act in good faith because circumstances of which holders had knowledge did not rise to level indicating that failure to inquire revealed deliberate desire to evade knowledge. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

Fraud in the inducement is an insufficient defense to a waiver of defenses provision in an assignment clause (Uniform Commercial Code, § 9-206, subd [1]) since fraudulent inducement is not a defense "of a type which may be asserted against a holder in due course", in that fraud in the inducement renders an obligation voidable, but not void, and is also not an available misrepresentation defense (Uniform Commercial Code, § 3-305, subd [2], pars [b], [c]); however, plaintiff bank, the assignee of an equipment lease and guarantee executed by defendants as part of a franchise agreement with the assignor, a muffler franchisor, is not entitled to summary judgment to recover the balance due and owing under the lease and remains vulnerable to defendants' claim of fraud in the inducement at this juncture since it failed to submit any proof sufficient to meet its burden of establishing that it took the assignment in good faith and without notice of any claims or defenses; defendants' allegations that the assignor entered into the lease and franchise agreements with the express purpose of fleecing the defendants and that plaintiff had notice of the assignor's fraudulent conduct raise a triable issue of fact as to notice sufficient to defeat plaintiff's motion for summary judgment. Chase Manhattan Bank v. Finger Lakes Motors, Inc., 102 Misc. 2d 48 (1979).

Defense of misrepresentation authorized by UCC § 3-305(2)(c) is a limited defense and may be asserted against a holder in due course only if a party was induced to sign an instrument because of misrepresentation that is coupled with fact that party signing instrument had neither knowledge of its character or essential terms, nor reasonable opportunity to obtain such knowledge. UCC § 3-305(2)(c) recognizes the defense of "real" or "essential" fraud, which is sometimes called "fraud in the essence" or "fraud in the factum," as being effective against a holder in due course. The defense extends to an instrument that is signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms. Ricks v. Bank of Dixie, 352 So. 2d 798 (Miss. 1977).

Where bank, as holder in due course, sued on note against maker and indorsers, defense that indorsers induced maker to sign note by misrepresentation was not available against bank as holder in due course pursuant to UCC § 3-305(2). Myers v. Bank of Prattville, 341 So. 2d 726 (Ala. 1977).

Regardless of whether payee's misrepresentations were sufficient to render him guilty of theft by deception, defenses under UCC § 3-305 of illegality and fraudulent misrepresentation were unavailable against bank, as holder-in-due-course of check, where drawer entered into home improvement contract with and gave check to payee upon payee's false representation that he had already purchased materials, where bank cashed check that same day, and where drawer subsequently stopped payment after discovering that no materials had been purchased. Citizens Nat'l Bank v. Brazil, 141 Ga. App. 388, 233 S.E.2d 482 (1977).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. Chicago Title & Trust Co. v. Walsh, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

Assignee of promissory note was holder in due course but was not entitled to summary judgment against individual defendants on their purported guarantee of notes, because defense of fraud in inducement had been raised and defendant had pleaded facts tending to establish that defense. Pioneer Credit Corp. v. Bon Bon Cleaners Corp., 38 A.D.2d 743 (2d Dep't 1972).

The statement of a check's drawer that she was induced to execute the check to payee by his knowingly false statement is not a defense to its payment when the instrument is in the hands of a holder in due course. Meadow Brook Nat'l Bank v. Rogers, 44 Misc. 2d 250 (1964).

Under the Georgia rule, fraud in procurement as a defense is confined to fraud of the holder and this view probably applies under the Code. Moore v. Southern Disct. Co., 107 Ga. App. 868, 132 S.E.2d 101 (1963).

The Code extends the concept of fraud as to the nature of the instrument to include an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms. Bancredit, Inc. v. Bethea, 68 N.J. Super. 62, 172 A.2d 10 (App. Div. 1961).

51. Procedural matters.

Where maker of promissory note raised defense of fraud in the inducement, holder had burden of showing that it was holder in due course, but having satisfied such burden, it was not subject to such defense. Federal Nat'l Mtg. Ass'n v. Gregory, 426 F. Supp. 282 (E.D. Wis. 1977).

Rights available to holder in due course against maker of notes provided by terms of UCC § 3-305 are enforced only after suit is filed and due notice is given to maker; thus, such rights do not deprive maker of hearing, but contemplate invocation only after opportunity is offered maker for hearing, thus providing ample due process. Fact that makers are barred from interposing certain defenses against holder in due course does not amount to denial of due process since makers are not foreclosed from pursuing their claims for damages or any other relief to which they are entitled against individual with whom they contracted. Hardy v. Gissendaner, 508 F.2d 1207 (5th Cir. Ala. 1975).

Assignee of promissory notes is not entitled to summary judgment against individual guarantors on their purported guarantee of the notes, because the defense of fraud in the inducement has been raised and guarantors have pleaded facts tending to establish that defense which is available against holder in due course. Pioneer Credit Corp. v. Bon Bon Cleaners Corp., 38 A.D.2d 743 (2d Dep't 1972).

Evidence raised fact questions as to whether note had been secured from makers by misrepresentation; held, makers were entitled to jury trial where their defense was false and fraudulent inducement in signing note. Kearney v. Commerce Inv. Co., 262 A.2d 804 (App. 1970).

On motion for summary judgment, "belief" that holder of note had knowledge of circumstances surrounding maker's financial troubles and incomplete performance was insufficient to show that defense exists within meaning of Code § 3-307(3). Factors & Note Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

It is unnecessary for the plaintiff to plead the facts showing consideration for the check on which he sues but there is not prohibition against the plaintiff so pleading or from adding such averments by amendment to his complaint. Minner v. Childs, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

52. Miscellaneous claims or defenses.

Where owner of house gave note to builder, following substantial completion of construction, upon assumption that work would be completed and that improperly constructed items would be corrected, and builder indorsed note to bank as security for loan, bank's rights as holder in due course were not cut off by statute making subsequent holders subject to all defenses of consumer, or on theory of "close connectedness." Randolph Nat'l Bank v. Vail, 131 Vt. 390, 308 A.2d 588 (1973).

IV. DECISIONS UNDER FORMER UCC § 75-3-306.

53. In general.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. Rutherford v. Rutherford, 573 S.W.2d 299 (Tex. Civ. App. 1978).

Although bank that issued cashier's check to individual who subsequently became bankrupt had no "defense" to instrument within meaning of UCC §§ 3-305(2) and 3-306(c), based on fact that bankrupt had guaranteed certain notes held by bank, this did not preclude bank from setting-off guaranty obligations of bankrupt against amount of cashier's check in action by receiver of bankrupt's estate to collect on cashier's check. In re Johnson, 552 F.2d 1072 (4th Cir. Va. 1977).

Where holder, who bought note from Federal Deposit Insurance Corporation as liquidating agent of bank pursuant to court decree permitting sale of commercial paper held by bank, failed to sustain contention that bank was holder in due course of such note and that he as bank's transferee had acquired such status, claim of defendant maker against payee for misrepresentations made after note's execution, which allegedly caused maker to sustain loss in excess of balance due under note, raised genuine issues of material fact that, under UCC § 3-306(a) and (b), barred recovery by plaintiff. Perry v. Schlaikjer, 5 Mass. App. Ct. 866, 367 N.E.2d 863 (1977).

Where bank negligently failed to perfect its security interest in growing corn crop by omitting description of real estate as required by UCC § 9-402, thereby causing said collateral to be subordinated to interest of third party, this constituted an unjustifiable impairment of such collateral and served to discharge accommodation party from liability to extent of such impairment of collateral under UCC § 3-306. First Sec. Bank & Trust Co. v. Voelker (In re Estate of Voelker), 252 N.W.2d 400 (Iowa 1977).

Written agreement by parties to promissory note executed contemporaneously with note in question which merely recited that corporate maker was attempting to develop foreign source of crude oil for import into United States and, for services rendered to corporation, individuals who were payees of note would be entitled to receive fee of 1 per cent per barrel from expected sale of crude oil, standing alone, did not alter or modify promissory note. Texas Export Dev. Corp. v. Schleder, 519 S.W.2d 134 (Tex. Civ. App. 1974).

Even if defendant's contention that the holder of a promissory note made by defendant was not a holder in due course, where it was found there were no valid claims or defenses to the note, the provision of UCC § 3-306 would in no way require that the holder be limited to only the consideration given by it for the note, and not the amount found to be due to the payees. Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968).

54. Particular defenses.

A general partner of a limited partnership breaches its fiduciary duty and violates section 98 (subd [1], par [d]) of the Partnership Law, which provides that a general partner shall have no authority to possess partnership property, or assign his rights in specific partnership property, without the written consent or ratification by all the limited partners, where it indorses and sells negotiable notes to a bank that were given to it as a capital contribution by the limited partners of the limited partnership, these notes to become due in the future, and deposits the proceeds of the sale in its own corporate account; the silence of the limited partners upon their discovery of the sale does not constitute ratification of the general partner's act where there is nothing to show that the limited partners had any reason to suspect that the bank held the notes other than for an indebtedness of the limited partnership in furtherance of its business. Chemical Bank v. Haskell, 68 A.D.2d 347 (4th Dep't 1979), rev'd on other grounds, 51 N.Y.2d 85, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980), reargument denied, 51 N.Y.2d 1009 (1980).

In bank's action to recover on promissory notes, where evidence revealed (1) that notes had been executed by defendant members of limited partnership to partnership itself, which had been formed to sell apartment projects, and (2) that corporate developer of project, which was sole general partner and managing agent of the limited partnership, had indorsed notes to itself in its corporate capacity, without required written consent or ratification of all of the limited partners, and has sold notes at discount to plaintiff, (1) plaintiff under UCC § 3-304(2) was not holder of notes in due course, since it knew that transferor had negotiated them to plaintiff without authority for transferor's sole benefit, (2) unauthorized indorsement of notes by limited partnership was wholly inoperative under UCC § 3-404(1) against both partnership itself and its members, and (3) even though partnership was not party defendant to action, in essence it was before the court, in the person of the defendant partners, within meaning of UCC § 3-306(d), since such partners were asserting their own rights and not rights of third person. Chemical Bank v. Ashenburg, 94 Misc. 2d 64 (1978).

In action by payee of bank money order issued by defendant bank for bank's refusal (on maker's stop-payment order) to honor instrument when payee presented it for payment, although bank asserted that payee was not holder in due course of instrument and thus was subject under UCC § 3-306(c) to defense of nondelivery, circumstantial evidence in case was sufficient for jury to conclude that maker had delivered instrument to payee's agent, since maker never explained how payee or his agent had obtained possession of instrument. Saad v. South Side Bank, 62 Ill. App. 3d 493, 379 N.E.2d 46 (1st Dist. 1978).

Under UCC § 9-306(2) secured party had right to require debtors to turn over to secured party for application on note proceeds of insurance check issued for damages to machinery rather than allowing debtors to use proceeds to repair machinery. Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976), review denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

Assignee for benefit of creditors was not holder in due course of promissory notes made payable to order of assignor; accordingly, under UCC § 3-306 assignee took instruments subject to affirmative defenses, including counterclaim that notes were based on contract between assignor and makers which former breached causing makers to suffer damages. Kaufman v. Sbarro of Sunrise Mall, Inc., 47 A.D.2d 734 (1st Dep't 1975).

In a cause of action based on a commercial draft, inasmuch as no negotiation, assignment, or other transfer of the draft has taken place, all personal and real defenses available against the other two causes of action based upon the underlying agreement are available here as well. Impex Metals Corp. v. Oremet Chem. Corp., 333 F. Supp. 771 (S.D.N.Y. 1971).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. Lazere Fin. Corp. v. Crystal Mart, Inc., 78 Misc. 2d 379 (1974).

The fact that there is a discharge of a party to an original note does not require concluding that accommodation parties thereon are discharged because the liability of the accommodation party may be preserved under UCC § 3-306(1)(a). A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

55. —Defenses available in simple contract.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. Rutherford v. Rutherford, 573 S.W.2d 299 (Tex. Civ. App. 1978).

Holder who is not holder in due course has much narrower rights than holder in due course and takes instrument, under UCC § 3-306(b) and § 3-408, subject to all defenses of any party which would be available in action on simple contract, including specifically the defenses of lack and failure of consideration. Kreutz v. Wolff, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Where defenses are raised against note, burden under UCC § 3-307 is on plaintiff to show that he is holder in due course in order to effectively cut off such defenses. If plaintiff fails to sustain his burden, his action is subject under UCC § 3-306(b) to all defenses that would be available on simple contract, as long as such defenses are in some way connected with debt sued on or transaction under which it arose. Seamans v. Miller, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

In action by real estate broker against clients to recover on promissory note given as commission from sale of property, clients had available all defenses which would be available in action on simple contract, including failure of consideration, since broker was payee of note and was not holder in due course. Duggins v. Simons, 517 S.W.2d 82 (Mo. 1974).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of consideration or fraud. TPO, Inc. v. FDIC, 487 F.2d 131 (3d Cir. N.J. 1973).

A holder who is not a holder in due course is subject to all defenses available in an action on a simple contract. Wyatt v. Mount Airy Cem., 209 Pa. Super. 250, 224 A.2d 787 (1966).

56. —Want or failure of consideration. In action by payee against maker of promissory note, maker was entitled under UCC § 3-306(c) and UCC § 3-408 to show by parol evidence that consideration for note had failed allegedly because of payee's failure to fulfill obligations under business agreement with maker (reversing summary judgment for payee because material issue of fact existed as to alleged failure of consideration for note). Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978).

Although plaintiffs, unless they had rights of holder in due course, took instrument subject to defense of want of consideration under UCC §§ 3-306(c) and 3-408, plaintiffs were entitled to recover on instrument under UCC § 3-307(2) where signatures were admitted and where defendant failed to establish defense of want of consideration. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned note to bank but failed to deliver equipment, bank was not holder in due course under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. Kaw Valley State Bank & Trust Co. v. Riddle, 219 Kan. 550, 549 P.2d 927 (1976).

Where bank issued $150,000 certificate of deposit to payee under mistaken impression that $150,000 had been deposited in correspondent bank when, in fact, money was not deposited, bank was entitled to rescind certificate of deposit transaction on ground of failure of consideration; since payee gave no value for certificate, payee was not holder in due course under UCC §§ 3-302 and 3-303 and, thus, under UCC § 3-306(c) payee was subject to defense of want or failure of consideration. Amos Flight Operations, Inc. v. Thunderbird Bank, 112 Ariz. 263, 540 P.2d 1244 (1975).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104; since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. Jones v. United Sav. & Loan Ass'n, 515 S.W.2d 869 (Mo. Ct. App. 1974).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc., 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Where bank paid $10,000 to railroad on same day it took promissory note for that amount from defendant, and defendant received notice of that payment and thereafter acknowledged his obligation to bank when he paid bank $1,000 and signed, along with his wife, second renewal note upon which suit was brought, trial court did not err in finding that defense of want of consideration was not established. Unruh v. Nevada Nat'l Bank, 88 Nev. 427, 498 P.2d 1349 (1972).

A note given by maker to payee for damage to the latter's truck which contained the notation that "it is agreed that this note is conditional and does not settle out any claim or demand payee has against the maker" was without consideration. Deems v. Wilson, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

57. —Nonperformance of condition precedent.

In action on check that plaintiff received from person to whom maker had negotiated it, and as to which plaintiff alleged that it was holder in due course, defense that maker and person to whom maker gave check had agreed that check would not be deposited until such person received authorization from maker, if established, would constitute valid defense under UCC § 3-306(c) to plaintiff's claim if plaintiff should fail to prove that it was holder in due course. American State Bank v. Richendifer, 36 Or. App. 199, 584 P.2d 323 (1978).

Where delivery of check was conditioned on its acceptance as settlement of note held by payee, and where payee did not deposit check for 11 months, proffered settlement was not accepted within reasonable time and check in question was subject to defense based on its conditional delivery and good against any person not holder in due course under UCC § 3-306(3); payee was not holder in due course under UCC § 3-302 in that his own conversation with plaintiff preceding delivery of check, together with notation on check, were ample evidence that payee had actual notice of drawer's defense. Losson v. Whitson, 535 S.W.2d 406 (Tex. Civ. App. 1976).

Under UCC §§ 3-305 and 3-306, agreement that any renewal note would be endorsed by all original endorsers, if proved, would make note unenforceable against guarantors, where delivery was conditional upon the procurement of all such endorsements. Long Island Trust Co. v. International Inst. for Packaging Educ., Ltd., 38 N.Y.2d 493, 344 N.E.2d 377 (1976).

Parol testimony is admissible as between immediate parties to negotiable instrument to prove that note although regular on its face, was delivered on condition that it be used only to provide working capital for a named corporation and then only in event that four other persons advanced like amount, and that condition precedent was not complied with. Kelley v. Carson, 120 Ga. App. 450, 171 S.E.2d 150 (1969).

Under § 3-401 of the Uniform Commercial Code, no person is liable on an instrument unless his signature appears thereon, and under § 3-306(c), except as to a holder in due course, no person is liable thereon unless there has been a delivery of instrument, and practically the same rule with reference to execution and delivery was in effect under the former Illinois Negotiable Instruments Law. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

58. —Breach of fiduciary duty.

A general partner of a limited partnership breaches its fiduciary duty and violates section 98 (subd [1], par [d]) of the Partnership Law, which provides that a general partner shall have no authority to possess partnership property, or assign his rights in specific partnership property, without the written consent or ratification by all the limited partners, where it indorses and sells negotiable notes to a bank that were given to it as a capital contribution by the limited partners of the limited partnership, these notes to become due in the future, and deposits the proceeds of the sale in its own corporate account; the silence of the limited partners upon their discovery of the sale does not constitute ratification of the general partner's act where there is nothing to show that the limited partners had any reason to suspect that the bank held the notes other than for an indebtedness of the limited partnership in furtherance of its business.

Chemical Bank v. Haskell, 68 A.D.2d 347 (4th Dep't 1979), rev'd on other grounds, 51 N.Y.2d 85, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980), reargument denied, 51 N.Y.2d 1009 (1980).

Defendants, the limited partners in a partnership formed by the corporate developer of an apartment house project to syndicate the sale of the project, who executed personal promissory notes to the partnership as part of the purchase price for their shares in the partnership of which the corporate developer was the sole general partner and managing agent, may raise as a defense against plaintiff bank in an action on the notes the breach of fiduciary duty by the general partner, which, after first approaching plaintiff bank for a corporate loan, indorsed the notes from the partnership to itself in its corporate capacity and then to plaintiff without the written consent or ratification of all the limited partners in violation of section 98 of the Partnership Law, since plaintiff, by purchasing the notes at a discount with knowledge that the notes were negotiated for the individual purposes of the general partner in breach of its fiduciary duty, is not entitled to the rights of a holder in due course (Uniform Commercial Code, § 3-304, subd [2]). The defense of breach of fiduciary duty belongs to defendants as limited partners and makers of the notes and not to the partnership since defendants, who have each been damaged by the breach of the fiduciary duty and stand to lose part of their interest in the partnership assets, are asserting their own rights and not the "claim of any third person". Chemical Bank v. Ashenburg, 94 Misc. 2d 64 (1978).

Bank which permitted new president and sole stockholder of corporation to cash checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit, and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it permitted sole stockholder to cash rather than deposit to corporation's account. Maley v. East Side Bank, 361 F.2d 393 (7th Cir. Ill. 1966).

59. —Claims of third persons.

In action on note given in payment for land, where (1) note was signed by both vendees and made payable to vendor, who died thereafter, (2) vendor's wife, individually and as executrix of vendor's estate, transferred note to plaintiff, and (3) defendant vendees contended since vendor's will did not authorize executrix to sell estate's assets, her transfer of note affected only her individual half interest therein, other half interest in note was still owned by vendor's estate, and plaintiff therefore was not entitled to judgment for full amount of note, court held that judgment awarding plaintiff full amount of note was proper under (1) UCC § 3-307(2), dealing with recovery by holder on instrument as to which signatures have been established, in absence of any defense to such recovery, and (2) UCC § 3-306(d), providing that claim of third person to an instrument is not available as a defense to party liable thereon unless such third person defends action for party liable. Cowhouse Dairy, Inc. v. Agristor Credit Corp., 566 S.W.2d 339 (Tex. Civ. App. 1978).

In action by holder of promissory note to recover payment from maker, maker could not assert defense that holder as trustee of trust estate acquired notes from trust estate in violation of statute; under UCC § 3-306(d), maker could not defend on basis of holder's alleged violation of his fiduciary duty to beneficiary. Furthermore, maker's payment of debt, even though made with knowledge of holder's wrongful acquisition of notes, would discharge maker's liability thereon under UCC § 3-603(1). Harvey v. Casebeer, 531 S.W.2d 206 (Tex. Civ. App. 1975).

Where bank has issued draft for value, delivers it to one who remits it to putative creditor, and thereafter, at remitter's request, stops payment and refunds consideration, this may constitute defense to action on instrument by payee, provided remitter has valid claim to instrument and provided he defends action on behalf of bank, urging such claim. Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973).

60. —Setoff.

Bank which took four notes from debtor which were executed to debtor by third party, under collateral assignment signed by debtor who did not indorse notes themselves, as collateral for note executed by debtor to bank was mere assignee of such notes and not holder or holder in due course thereof; collateral assignment gave bank right to sue on notes, subject under UCC § 3-306(a) to all defenses and equities to which notes were subject while in debtor's hands; and in suit by bank against third party who executed and transferred notes to debtor, third party could introduce evidence of alleged offsets to notes based on unpaid judgment obtained by third party against debtor. Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Although Uniform Commercial Code does not define "defense" as term is used in UCC § 3-306(b), § 3-306(b) makes available defense of setoff in action by transferee of negotiable instrument unless transferee is holder in due course. Community Bank v. Ell, 278 Or. 417, 564 P.2d 685 (1977), reh'g denied, 279 Or. 245, 566 P.2d 903 (1977).

Where depositary bank, as holder of check which defendant drew in favor of bank's depositor and then stopped payment thereon, brought suit on drawer's contract under UCC § 3-413(2), "defenses" which drawer was entitled to assert under UCC § 3-306(b) included only those defenses connected with instrument itself, and did not include setoff based on separate and distinct transactions between drawer and original payee. Bank of Wyandotte v. Woodrow, 394 F. Supp. 550 (W.D. Mo. 1975).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of set off against payee. United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596 (D. Md. 1973).

Where employer gives employee a note for gross wages, the employer was entitled to setoff against the payee's claim on the note the amount that should have been deducted for federal withholding taxes. Lukens v. Goit, 430 P.2d 607 (Wyo. 1967).

61. —Fraud or illegality.

In action by Federal Deposit Insurance Corporation (FDIC), as owner-holder of note purchased from bank for which FDIC was receiver, to recover on such note from defendant maker, (1) defendant under UCC § 3-306(d) could not assert FDIC's allegedly illegal acquisition of note as defense, since only the bank in receivership or such bank's shareholders had standing to assert such defense, and (2) if defendant satisfied note by payment to FDIC, he would not risk double liability on note in event bank's sale of note to FDIC should be set aside, but would be discharged from liability under UCC § 3-603(1), (applying South Carolina law; also holding that oral agreement to extend time for paying note was unenforceable under non-UCC statute of frauds). FDIC v. Moore, 448 F. Supp. 493 (D.C.S.C. 1978).

Under an exception to the parol evidence rule, extrinsic evidence may be admitted to show fraud in the inducement of a the written sales contract. UCC § 3-306(b) makes this rule applicable to an action on a promissory note where the holder of the note is not a holder in due course. However, if a negotiable instrument is clear and express in its terms, it cannot be varied by parol agreements or representations by the payee that the maker or a surety will not be liable on the instrument, since such representations do not constitute fraud in the inducement (observing that some sort of trick, artifice, or device must have been employed by the payee, in addition to his representation that the maker would not be liable, to constitute fraud in the inducement of the instrument). Town N. Nat'l Bank v. Broaddus, 569 S.W.2d 489 (Tex. 1978).

Where bank loaned $25,000 to officer of corporation that was heavily indebted to bank and could not borrow such money itself, and where officer's note to bank for such sum, which was used by corporation, was executed allegedly because of fraudulent assurances by bank official that bank would not hold maker of note personally liable thereon but would instead look to corporation for payment, summary judgment on note in favor of bank would be reversed because defendant maker alleged sufficient facts to show (1) that bank was not holder in due course of such note under UCC § 3-302(1)(b), and (2) that bank therefore under UCC § 3-306(b) took note subject to all defenses of maker that would be available in action on simple contract, including defense of fraud in inducement. Thompson v. First Nat'l Bank & Trust Co., 142 Ga. App. 174, 235 S.E.2d 582 (1977), rev'd on other grounds, 240 Ga. 494, 241 S.E.2d 253 (1978).

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. Viracola v. Dallas Int'l Bank, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

A person who takes a note with notice that it is overdue is not a holder in due course and a holder who obtains his title from a holder in due course cannot enforce the instrument when he was a party to some fraud or illegality affecting it. Brown v. Scales, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

62. Procedural matters.

In action by payee-bank on promissory note which was unconditional on its face, parol evidence could not be used to inject conditions on obligations which were not apparent from face of note, and there was no merit to makers' contention that their agreement with payee bank, to transfer note to newly-formed corporation, was admissible as evidence that note was delivered for special purpose. Tatum v. Bank of Cumming, 135 Ga. App. 675, 218 S.E.2d 677 (1975).

Where holder has made prima facie case showing his right to payment under UCC § 3-306, holder is entitled to temporary injunction to keep funds, located in Illinois and represented by a nonnegotiable certificate of deposit from passing to out-of-state assignee. D. Nelsen & Sons v. General Am. Dev. Corp., 6 Ill. App. 3d 6, 284 N.E.2d 478 (1st Dist. 1972).

Although want or failure of consideration may be raised as a defense in an action upon a negotiable instrument against any person not having the rights of a holder in due course, it must be pleaded as an affirmative defense and may not be raised under a general denial. Rochester Iron & Metal Co. v. Capellupo, 62 Misc. 2d 264 (1969).

The allegation of the defense of failure of consideration in an answer filed, by the maker of the note to an action thereon by a transferee, casts the burden on the plaintiff of establishing that he or some person under whom he claimed was in all respects a holder in due course, and raised a general issue of material fact. Pitillo v. Demetry, 112 Ga. App. 643, 145 S.E.2d 792 (1965).

V. DECISIONS UNDER FORMER STATUTES.

63. Decisions under former Code 1942 § 57.

The delivery of a note to one of two or more payees will operate as a delivery to all. Vaughn v. Vaughn, 238 Miss. 342, 118 So. 2d 620 (1960).

Where buyer of automobile signed conditional sale contract with blank spaces, expecting seller's salesman to fill in the blanks, he thereby made seller his agent, so that balance stated in the contract was binding on buyer where contract was in hands of a bona fide purchaser for value which took the instrument in due course without notice. Universal Credit Co. v. Moore, 173 Miss. 740, 163 So. 142 (1935).

Payee's negotiation of instrument in violation of agreement with payer no defense as against innocent purchaser for value without notice. Currie-McGraw Co. v. Friedman, 135 Miss. 701, 100 So. 273 (1924).

64. Decisions under former Code 1942 § 101.

Where holders in due course at the time of purchasing trade acceptances had no notice or knowledge of any dispute between the defendant and the sellers of merchandise, and made no promise to carry out any agreement that might have been made between such sellers and defendant, either prior to the purchase of the trade acceptances or prior to the receipt of promissory notes, which were a renewal of the indebtednesses represented by the trade acceptances, defendant's defense that the trade acceptances had been given in reliance upon seller's promissory representation fraudulently made without intention of carrying them out could not prevail. Salitan v. Ford, 231 Miss. 616, 97 So. 2d 232 (1957).

RESEARCH REFERENCES

ALR. What constitutes taking instrument in good faith, and without notice of infirmities or defenses, to support holder-in-due-course status, under UCC § 3-302. 36 A.L.R.4th 212.

Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:291 et seq. (what constitutes holder in due course).

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.

SOURCES: Former § 75-3-303: Codes, 1942, § 41A:3-303; Laws, 1966, ch. 316, § 3-303; Laws, 1992, ch. 420, § 29, eff from and after January 1, 1993.

JUDICIAL DECISIONS

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I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-303.

11. In general.

Bank which issued a cashier's check to replace a personal check took the personal check in good faith and for value and was thus holder in due course under UCC §§ 3-302 and 3-303 where bank manager ascertained validity of check by telephone call to drawer's bank prior to drawer's placement of stop payment order on check. Manufacturers & Traders Trust Co. v. Murphy, 369 F. Supp. 11 (W.D. Pa. 1974), aff'd, 517 F.2d 1398 (3d Cir. Pa. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

A bank accepting a negotiated instrument in satisfaction of an antecedent debt is a holder for value and in due course. Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. Okla. 1964).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

The Code was also cited in a pre-code decision that a bank was not a holder in due course upon merely crediting the depositor's account. Bankers Trust Co. v. Nagler, 16 A.D.2d 477 (1st Dep't 1962).

Under both the Negotiable Instruments Law and the Uniform Commercial Code a bank which received a deposit of two checks and paid checks drawn by the depositor on the total amount of these checks was a holder for value of the two deposited checks, notwithstanding the fact that they were deposited with the usual bank deposit slip reciting that the item was received by the bank for collection only. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

12. Performance of agreed consideration.

Where trade acceptances were given to attorneys as a retainer for services to be performed by the attorneys, and unknown to the attorneys the trade acceptances had been obtained by fraud, which however, was not such as to constitute a defense against holders in due course under §§ 3-305(2)(c) and 3-306(b) of the instant chapter, and where prior to taking the acceptances the attorneys had rendered some services but there was no evidence as to their value, it was held that the "agreed consideration" under the instant section for the acceptances was the performance of legal services, that under § 3-307(3) once a defense to the instruments was shown to exist, the burden was on the attorneys to show that they were holders in due course, that the attorneys had failed to show the extent to which the agreed consideration had been performed and therefore that they had not shown to what extent they took for value under the instant section, the result being that they had not shown themselves to be holders in due course under § 3-302 of the instant chapter. Korzenik v. Supreme Radio, Inc., 347 Mass. 309, 197 N.E.2d 702 (1964).

Where trade acceptances were transferred to attorneys as a retainer for services to be performed by the attorneys, the fact that one of the attorneys had paid to co-counsel part of the money he collected on the assigned items was not evidence that he had made an irrevocable commitment to a third person within the meaning of the instant section. Korzenik v. Supreme Radio, Inc., 347 Mass. 309, 197 N.E.2d 702 (1964).

13. Credit as value.

Bank's giving provisional credit for check it deposited in account of bank's customer does not constitute parting with value for check under UCC § 3-303. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Whether bank took note in payment of outstanding loan or as collateral for issuance of loan was immaterial with respect to bank's status as holder in due course since holder who takes negotiable instrument as collateral for loan takes for value within UCC § 3-303(a) and may thereby be holder in due course. Millman v. State Nat'l Bank, 323 A.2d 723 (D.C. 1974).

Where individual testified that greeting service owed him a large sum which he had invested in the business, that certain debentures were assigned to him as payment or security for this debt, and that after making the assignment he paid off some corporate obligations and placed some money in the corporation's account which was used to pay salaries, there was sufficient evidence to show that assignment was for value within UCC § 3-303. Martin Mgt. Corp. v. Farner, 124 Ga. App. 552, 184 S.E.2d 597 (1971).

Value has been given where full amount of credit given for drafts has been withdrawn. F & M Nat'l Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

Value was given for full amount of credit extended, whether or not withdrawals were actually made. Washington Trust Co. v. Fatone, 104 R.I. 426, 244 A.2d 848 (1968), appeal denied, appeal dismissed, 106 R.I. 168, 256 A.2d 490 (1969).

The Code adopts the better and majority view that the mere giving of credit without more is not the giving of value. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

14. Payment of, or security for, antecedent claim.

Bank gave value for full amount of check at time that it accepted deposit, where bank and depositor had entered security agreement giving bank floating lein on depositor's chattel paper and where check represented part of proceeds of depositor's conditional sales contract and where bank had made prior loan to depositor in expectation of deposit of check at issue. Bowling Green, Inc. v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999).

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255 (5th Cir. 1982).

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. GMAC v. General Accident Fire & Life Assurance Corp., 67 A.D.2d 316 (4th Dep't 1979).

In action by plaintiff bank against defendant bank for wrongfully stopping payment on $10,000 money order issued by defendant which named plaintiff as payee, where evidence showed (1) that defendant had issued money order at instance of seller of irrigation system, which wished to present buyer's check for $10,000 to defendant while buyer still had sufficient funds in his account with defendant, (2) that at time defendant issued money order, it did not know that buyer had placed stop-payment order on check buyer had given to seller, (3) that seller's agent became aware of such stop order after defendant had issued money order in suit, (4) that seller's agent, on giving money order to plaintiff, asked plaintiff to apply it to loan made by plaintiff to seller, (5) that plaintiff complied with such request, made the necessary credit entries on its loan ledger, and put money order into usual channels for collection, (6) that money order was thereafter returned to plaintiff marked "payment stopped," and (7) that plaintiff thereafter reversed credit entries made with respect to loan to seller and returned principal balance of loan to its original amount, court held (1) that defendant's right both to assert defense of failure of consideration (based on buyer's stopping payment on buyer's check) and to stop payment on money order issued by it depended on whether plaintiff was holder in due course of such money order; (2) that plaintiff was not holder in due course because it had given no "value" for money order within meaning of UCC § 3-303(b), dealing with payment of antecedent claims; (3) that such failure to give value was shown by plaintiff's reversal of provisional credit entries made with respect to loan to seller; (4) that defendant was therefore entitled to stop payment on money order; and (5) that defense of failure of consideration was available to defendant on remand of case to trial court. State Bank v. American Nat'l Bank, 266 N.W.2d 496, 97 A.L.R.3d 706 (Minn. 1978).

Although antecedent claim may constitute value under UCC § 3-303(b), where no antecedent claim existed, holder of note (1) did not take instrument for value, (2) was not holder in due course under UCC § 3-302(1)(a), and (3) held note subject to defense of lack of consideration. Quazzo v. Quazzo, 136 Vt. 107, 386 A.2d 638 (1978).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof, alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Endorsee of check on which payment had been stopped for failure of consideration was not entitled to recover value of check where endorsee, who merely agreed to attempt to collect check and to apply collected funds, if any, to payee's account, did not accept check in payment of payee's antecedent debt and was not holder for value under UCC § 3-303. Wilson Supply Co. v. West Artesia Transmission Co., 505 S.W.2d 312 (Tex. Civ. App. 1974), ref. n.r.e., 511 S.W.2d 261 (Tex. 1974).

Where corporation assigned note to government as security for payment of tax liens, government was holder in due course under UCC § 3-303(b). Coventry Care, Inc. v. United States, 366 F. Supp. 497 (W.D. Pa. 1973).

Bank which accepted a cashier's check in payment of an antecedent debt would have been a holder in due course where it acted in good faith and without notice that the debtor had committed a fraud in securing the money represented by the check. Nicklaus v. Peoples Bank & Trust Co., 258 F. Supp. 482 (E.D. Ark. 1965), aff'd, 369 F.2d 683 (8th Cir. Ark. 1966).

A holder takes commercial paper for value to the extent that he acquires a security interest therein or takes it as security for an antecedent claim; and is a holder in due course where he takes the paper for value, in good faith, and without notice that it is overdue, has been dishonored, or is subject to the claim or defense of another person. Finance Co. of Am. v. Wilson, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank accepting a negotiated instrument in satisfaction of an antecedent debt is a holder for value and in due course. Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. Okla. 1964).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

15. —Antecedent claim as to partial amount.

Bank gave value for full amount of check at time that it accepted deposit, where bank and depositor had entered security agreement giving bank floating lein on depositor's chattel paper and where check represented part of proceeds of depositor's conditional sales contract and where bank had made prior loan to depositor in expectation of deposit of check at issue. Bowling Green, Inc. v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999).

Depositary bank took check "for value", at least to extent of $5,024.85, amount which it took in payment of antecedent debt where depositor had overdraft in that amount. Bowling Green, Inc. v. State St. Bank & Trust Co., 307 F. Supp. 648 (D. Mass. 1969), aff'd, 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank; and (4) where bank also gave owner its check, payable to corporation, for remaining proceeds of cashier's checks and owner endorsed and deposited such check in corporation's account, bank gave value under UCC § 3-303 for cashier's checks-and thus became holder in due course as to such checks so as not to be liable to buyer for fraud and conversion in sale transaction-because (1) application of proceeds of cashier's checks to satisfy corporation's liability to bank on notes constituted taking for value under payment of "antecedent claim" provision in UCC § 3-303(b); (2) giving owner check, payable to corporation, for remaining proceeds of cashier's checks constituted taking for value under UCC § 3-303(c); and (3) bank's assignment to buyer, pursuant to owner's instructions, of bank's security interest in corporation's assets constituted taking for value under performance of "agreed consideration" provision in UCC § 3-303(a). In such case, since bank was not party to sale contract but merely applied proceeds of cashier's checks pursuant to instructions of corporation's owner and in compliance with UCC § 3-303, buyer's remedy in contract for failure of consideration in sale transaction would lie only against owner. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

A bank gives value for a note when it reduces the debt owed it by the amount of the note. Franklin Nat'l Bank v. Sidney Gotowner, Inc., 4 U.C.C. Rep. Serv. 953 (1967, NY Sup).

16. Irrevocable commitment to third person.

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank; and (4) where bank also gave owner its check, payable to corporation, for remaining proceeds of cashier's checks and owner endorsed and deposited such check in corporation's account, bank gave value under UCC § 3-303 for cashier's checks-and thus became holder in due course as to such checks so as not to be liable to buyer for fraud and conversion in sale transaction-because (1) application of proceeds of cashier's checks to satisfy corporation's liability to bank on notes constituted taking for value under payment of "antecedent claim" provision in UCC § 3-303(b); (2) giving owner check, payable to corporation, for remaining proceeds of cashier's checks constituted taking for value under UCC § 3-303(c); and (3) bank's assignment to buyer, pursuant to owner's instructions, of bank's security interest in corporation's assets constituted taking for value under performance of "agreed consideration" provision in UCC § 3-303(a). In such case, since bank was not party to sale contract but merely applied proceeds of cashier's checks pursuant to instructions of corporation's owner and in compliance with UCC § 3-303, buyer's remedy in contract for failure of consideration in sale transaction would lie only against owner. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Corporation that promised to give 25 per cent interest in prospective business venture in return for $20,000 note did not make irrevocable commitment; thus, it did not give value as required by UCC § 3-303, and failed to prove that it was holder in due course, entitled to priority over government's lien on note for unpaid taxes; agreement to give 25 per cent interest in prospective business venture was so vague and nebulous as to be unenforceable and, in any event, was merely executory contract which corporation could have refused to perform because of failure of consideration, i.e., because government's rights to note had intervened by virtue of its liens and levies and notes were therefore worthless. Coventry Care, Inc. v. United States, 366 F. Supp. 497 (W.D. Pa. 1973).

Payee takes for value by making irrevocable payment of consideration to third person at direction of maker. Ashburn Bank v. Childress, 120 Ga. App. 632, 171 S.E.2d 768 (1969).

Where seller, in consideration of receipt of cashier's checks aggregating $600,000, made actual physical delivery of certificates evidencing all of his stock in a corporation in escrow to be delivered to the purchaser when the seller had been relieved of his bank guarantees without anything further to be done on his part, the transfer was irrevocable for the only remaining act to complete delivery was solely within the power of the purchaser; and such delivery in escrow constituted an "irrevocable commitment" as provided in clause (c) of § 3-303, and the seller had taken the cashier's checks for value and was a "holder in due course." Crest Fin. Co. v. First State Bank, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

III. DECISIONS UNDER FORMER UCC § 75-3-408.

17. In general.

There is no want of consideration, as distinguished from value, within meaning of UCC § 3-408 when consideration moves before maturity to party accommodated, even though accommodation maker receives no consideration for executing instrument. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

To sustain defense of no consideration against holder, drawer must show that he received nothing in return for note he had promised to pay or that there are circumstances in which consideration is not required to support this promise, e.g., note given in payment of or as security for some antecedent obligation. Srochi v. Kamensky, 118 Ga. App. 182, 162 S.E.2d 889 (1968).

18. Availability of defense.

Holder who is not holder in due course has much narrower rights than holder in due course and takes instrument, under UCC § 3-306(b) and § 3-408, subject to all defenses of any party which would be available in action on simple contract, including specifically the defenses of lack and failure of consideration. Kreutz v. Wolff, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under

UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also counterclaimed for damages for such fraud). Kreutz v. Wolff, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Document purporting to transfer and assign promissory note which was never attached to note did not serve as effective endorsement of note under UCC § 3-202(2); since note was not issued or endorsed to assignee, assignee was not holder of note as defined in UCC § 1-201(20) and, not being holder, assignee could not possibly be holder in due course and assignment of note was therefore subject to defense of failure of consideration. Billas v. Dwyer, 140 Ga. App. 774, 232 S.E.2d 102 (1976).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of consideration or fraud. TPO, Inc. v. FDIC, 487 F.2d 131 (3d Cir. N.J. 1973).

It is immaterial that consideration moves from or to a third party, since to prove failure of consideration under UCC § 3-408, defendants must show that the obligation cannot be enforced against them. Behrens v. Apessos, 39 Mich. App. 426, 197 N.W.2d 886 (1972).

In a suit on a note given for purchase of personal property, a claim of breach of warranty is equivalent to a plea of failure of consideration, and such defense is allowed, as against one who is not a holder in due course, on the principle that consideration of a note to open to inquiry as far as the promise to pay depends upon its existence. Northern Plumbing Supply, Inc. v. Gates, 196 N.W.2d 70 (N.D. 1972).

Where there is a suit on a note and it appears that there was consideration to a corporation and thus to the defendant directors who endorsed the note, the fact that the consideration was furnished by one other than the promisee would not prevent the promisee from maintaining suit on such a note. Edgar v. Edgar Casket Co., 125 Ga. App. 389, 187 S.E.2d 925 (1972).

Failure of consideration on contract is defense to suit on promissory note executed under terms of contract. Farmers Coop. Ass'n v. Garrison, 248 Ark. 948, 454 S.W.2d 644 (1970).

Defense of want or failure of consideration is available to indorser of instrument as well as to drawer. Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968).

An indorser may raise the defense of failure of consideration and that defense is not limited to a drawer or to a person stopping payment on a check. Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968).

19. —Against holder in due course.

Where the defendant dealt with the holder in due course, the holder in due course is subject to the defense that the consideration he was to give had failed, as it is only a failure of consideration with respect to a third person which is a limited defense under the Code. Brotherton v. McWaters, 438 P.2d 1 (Okla. 1968).

20. Adequacy of consideration.

Consideration within meaning of UCC § 3-408 may consist of some benefit to one party or some detriment to the other party (holding that note which consolidated two prior obligations was supported by sufficient consideration). Edmiston v. J.C.G.-Medallion, Inc., 570 S.W.2d 306 (Mo. Ct. App. 1978).

Where (1) debtor-owner of two corporations borrowed funds from bank, executed personal notes evidencing such loans, and funneled loan proceeds into his two corporations, (2) bank subsequently had such corporations execute notes and security agreements to bank covering total amount of money loaned to debtor and also had debtor sign two personal notes that were identical in amount to corporate notes and were due on same date, and (3) bank additionally had debtor and debtor's wife execute personal guaranties of corporate notes, trial court properly held that under UCC § 3-408, corporate notes and security agreements were supported by sufficient consideration, and that such consideration was debtor's antecedent personal debts to bank. However, since there was no evidence that signature of debtor's wife had been a prerequisite to bank's extension of credit to debtor or to debtor's two corporations, and also no evidence that wife had been comaker of any of debtor's prior personal notes that debtor had given to bank, wife's personal guaranty of notes executed by debtor's corporations in favor of bank was void for lack of consideration. H. Watson Dev. Co. v. Bank & Trust Co., 58 Ill. App. 3d 423, 374 N.E.2d 767 (1st Dist. 1978).

Where agreement between seller of stock and buyer stipulated that escrow and collection agent would relinquish proportionate share of stock following each monthly payment, where buyer executed promissory note secured by pledge of stock, and where buyer unilaterally stopped payments, seller was entitled to recover for balance of note as buyer failed to establish defense of want of consideration under UCC § 3-408 by virtue of nondelivery of stock. Wallace v. Ralph Pillow Motors, Inc., 344 So. 2d 949 (Fla. App. 1977).

Although plaintiffs, unless they had rights of holder in due course, took instrument subject to defense of want of consideration under UCC §§ 3-306(c) and 3-408, plaintiffs were entitled to recover on instrument under UCC § 3-307(2) where signatures were admitted and where defendant failed to establish defense of want of consideration. Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc., 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Promissory note executed by shareholder to partially satisfy overdraft of corporation was supported by consideration under UCC §§ 3-307(2) and 3-408 despite contentions that note was signed at request of bank to protect it from bank examiners and until another loan could be obtained from Small Business Administration. Farmer v. Peoples Am. Bank, 132 Ga. App. 751, 209 S.E.2d 80 (1974).

Under UCC § 3-408, any consideration which would be sufficient to uphold an ordinary contract would be sufficient consideration to validate a promissory note, and this includes any detriment to payee, such as his failure to benefit from sale of property at reduced rate, so long as unclouded and unaffected by fraud or mistake. Hallowell v. Turner, 94 Idaho 718, 496 P.2d 955 (1972).

Under UCC any consideration which would be sufficient to uphold ordinary contract would be sufficient consideration to validate promissory note. Hallowell v. Turner, 94 Idaho 718, 496 P.2d 955 (1972).

An agreement to release a third party from liability is a valid consideration for the obligation incurred by the parties securing the release within UCC § 3-408. Blake-Cadillac Oldsmobile, Inc. v. Cackovic, 54 Pa. D. & C.2d 160 (1971).

Check was drawn upon escrow account; held, transfer of funds resulting therefrom constituted adequate consideration for issuance of cashier's check. Pennsylvania v. Curtiss Nat'l Bank, 427 F.2d 395 (5th Cir. Fla. 1970).

There is no want of consideration, as distinguished from value, within meaning of UCC § 3-408 when consideration moves before maturity to party accommodated, even though accommodation maker receives no consideration for executing instrument. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

A promissory note is supported by consideration when given in payment for prior substantial legal services and the agreement of the payee to refrain from seeking payment against enterprise assets, which act of refraining would reduce the amounts which the makers of the note would have been required to contribute. Miller v. Simoni, 4 U.C.C. Rep. Serv. 1171 (1968, NY Sup).

Rescission of an option agreement covering only the interest of husband in land owned by both husband and wife amounted to a full legal consideration supporting wife's obligation as co-maker of a promissory note. Haygood v. Stevenson Co., 114 Ga. App. 335, 151 S.E.2d 462 (1966).

21. —Failure of consideration.

Note executed by manager of used car agency was supported by sufficient consideration under UCC § 3-408, and not solely by manager's moral obligation to pay, where payees, in return for manager's promise to pay $7657, agreed to assume and discharge indebtedness of $8500 at bank, which represented sale by manager of automobiles out of trust. Alexander v. DeLacruz, 545 P.2d 518 (Utah 1976).

Where mortgagor executed promissory note for $8,000 on October 18, but mortgagee did not advance funds and, instead, mortgagee and mortgagor went to bank on October 24 and bank loaned mortgagee $8,000 on his personal, unsecured note, which mortgagor cosigned, October 18 note was unenforceable for failure of consideration under UCC § 3-408, notwithstanding mortgagor received proceeds of October 24 note and mortgagee repaid note; since mortgagor's signature obligated him as maker to pay bank's note according to its tenor under UCC § 3-413, regardless of any understanding between mortgagee and mortgagor, execution of second note resulted in abandonment of October 18 note as instrument through which indebtedness between parties should be memorialized and repayment enforced. Anderson v. County Properties, Inc., 14 Wash. App. 502, 543 P.2d 653 (1975).

If maker signed note at payee's behest so that payee could show bookkeeping loss, and not in satisfaction of indebtedness arising out of real estate transaction, there was no consideration for note and this would be complete and meritorious defense under UCC § 3-408 to suit on note by payee. Ritchey v. Mars, 227 Pa. Super. 33, 324 A.2d 513 (1974).

Where a demand note is given to induce forbearance the note is not supported by consideration since the note is immediately due and does not bind the payee to forbear for any period of time. Flintkote Co. v. Grimes, 281 Ala. 707, 208 So. 2d 87 (1968).

A note given by maker to payee for damage to the latter's truck which contained the notation that "it is agreed that this note is conditional and does not settle out any claim or demand payee has against the maker", was without consideration. Deems v. Wilson, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

Defense denying both that there was any consideration for the note originally and that the plaintiff was a holder in due course was meritorious. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

In suit on promissory note executed by defendant to cover balance due plaintiff on automobile repair bill, fact that some of repair parts used were defective does not constitute defense to note on ground of fraud, but at most defendant is entitled to defend because of an alleged failure of consideration of note to extent only of credit due on account of defective condition of repair part and is entitled in no event to deduction for more than cost of new parts and value of labor for installing same. Douglas v. Warren, 44 So. 2d 853 (Miss. 1950).

22. Antecedent obligation, generally.

An accommodation endorsement made by a decedent on a negotiable instrument which represented a consolidation and renewal of two outstanding notes owed by his son was valid since, as security for an antecedent obligation, no consideration was necessary under this section. Wilson v. Planters Bank, 383 So. 2d 1089 (Miss. 1980).

Widow who executed note to bank renewing earlier notes which were given to extinguish her deceased husband's indebtedness to bank could not avoid liability on renewal note on ground that there was no consideration therefor, since UCC § 3-408 declares that no consideration is necessary for instrument given in payment of antecedent obligation. First Nat'l Bank v. Carver, 375 So. 2d 1198 (Miss. 1979).

Where amount of unpaid promissory notes represented a loan, such amount, under UCC § 3-408, constituted obligation owed by makers which existed when notes were executed and thus supplied requisite consideration for notes. Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

Under UCC § 3-408, note given to payee to discharge antecedent obligation did not require consideration. Cleveland v. Pleasuretime Dev. Corp., 143 Ga. App. 518, 239 S.E.2d 203 (1977).

Promissory note which set forth fact showing it was given for no other consideration but kindness and affection was unenforceable. "Particular kindness" bestowed upon decedent maker by payee of note did not constitute antecedent obligation within meaning of UCC § 3-408, since payee was nephew of decedent maker and law presumed gratuitous any services rendered, absent proof of contract to pay for such services. In re Estate of Wetmore, 36 Ill. App. 3d 96, 343 N.E.2d 224 (5th Dist. 1976).

Note given in connection with settlement of contract dispute was enforceable against makers notwithstanding claim that there was failure of consideration by reason of payee's refusal to honor warranty provision of settlement contract; note was given in payment of and as security for antecedent obligation and, thus, no consideration was necessary under UCC § 3-408, and consideration was given since settlement of disputed claim was sufficient to render entire contract binding. Doyal v. Ben O'Callaghan Co., 132 Ga. App. 336, 208 S.E.2d 136 (1974).

UCC § 3-408 changes previous Tennessee rule in providing that new consideration is not required for a note given in payment of or as security for the antecedent debt of a third party. Musulin v. Woodtek, Inc., 260 Or. 576, 491 P.2d 1173 (1971).

UCC § 3-408 consideration requirement is satisfied by "an antecedent debt of any kind" including the antecedent debt of a third party. Musulin v. Woodtek, Inc., 260 Or. 576, 491 P.2d 1173 (1971).

Want of or failure of consideration is no defense where notes and mortgages were given for antecedent obligation. Northwestern Nat'l Bank v. Steinbeck, 179 N.W.2d 471 (Iowa 1970).

Renewal obligation must be supported by valuable consideration other than original obligation itself in order to bind party who was not obligor upon original instrument; pre-existing debt is sufficient consideration, by itself, to support renewal thereof by obligor upon original debt. Capital City Bank v. Baker, 59 Tenn. App. 477, 442 S.W.2d 259 (1969).

No consideration is necessary for an instrument given in payment of or as security for an antecedent obligation of any parent. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

No consideration is necessary for an instrument given in payment of or as security for an antecedent obligation. Hamilton Watch Emp. Fed. Credit Union v. Retallack, 61 Lanc. L. Rev. 159 (Pa. 1967).

An antecedent debt is adequate consideration for a promissory note. Coal Operators Cas. Co. v. Johnson, 213 F. Supp. 146 (E.D. Ky. 1963).

23. —Payment of obligation.

Where makers executed note for $60,000, but received only $10,000 and remaining $50,000 was never advanced, and where makers subsequently executed note for $10,000 and payee returned original note, no consideration beyond antecedent debt of $10,000 was necessary to enforceability of $10,000 note; furthermore, even if additional consideration was necessary, it could be found in return of original note to makers. Pacific Coast Capital Corp. v. Research to Reality, Inc., 57 Mich. App. 75, 225 N.W.2d 177 (1974).

No consideration was necessary for renewal note given in payment of or as security for antecedent obligation, and it was immaterial that at time renewal note was given maker was insolvent and unable to pay obligation at its maturity. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

24. Security for obligation.

Under UCC § 3-408, payee's failure to extinguish pre-existing debts did not prevent payee from enforcing promissory notes which were executed to induce payee to extend further credit and to forbear immediate collection of pre-existing debts. GE Co. v. Construction Assocs., 426 F. Supp. 986 (E.D. Mo. 1977).

Under UCC § 3-408, note given to bank by investor incorporation was not required to be supported by consideration where purpose of note was to prevent bank from instituting foreclosure proceedings against corporation, which was in default on antecedent obligation owed to bank (rejecting investor's contention that because he did not receive amount for which note was executed, there was no consideration for note and therefore no liability thereon). Mock v. First City Nat'l Bank, 352 So. 2d 1112 (Ala. 1977).

Under UCC § 3-408 consideration was not required for second note where second note and trust deed were given to secure payment of first note. Tracy Collins Bank & Trust Co. v. Seiger, 546 P.2d 237 (Utah 1976).

Under UCC § 3-408, execution of note to secure the antecedent or existing indebtedness of another needs no consideration, and where father made gift of property to son, son's subsequent note and trust deed to father to secure father's indebtedness on property, were valid as accommodation without a showing of consideration. Kitzer v. Kitzer, 20 Ill. App. 3d 54, 312 N.E.2d 699 (2d Dist. 1974).

In action by guarantor of renewal and extension promissory notes against maker, maker's defense of want or failure of consideration was untenable because, under UCC § 3-408, no consideration was necessary for extension of antecedent obligation. Blake v. Coates, 292 Ala. 351, 294 So. 2d 433 (1974).

Want of consideration was no defense to action on note indorsed by officer of corporate maker, where note represented security for previously existing obligation of corporation. Lumbermen Assocs. v. Palmer, 344 F. Supp. 1129 (E.D. Pa. 1972), aff'd, 485 F.2d 680 (3d Cir. Pa. 1973).

Maker gave note as security for antecedent obligation of corporation in which he had invested; held, no consideration was necessary to establish valid obligation between maker and payee. A.M. Castle & Co. v. Bagley, 24 Utah 2d 136, 467 P.2d 408 (1970).

25. Validity of obligation.

Professional legal services rendered for benefit of third party for which note was executed by maker in consideration thereof constituted valid antecedent debt under UCC § 3-408 upon which payee could successfully sue maker as if payee were holder in due course. Austrian, Lance & Stewart, P.C. v. Hastings Properties, Inc., 87 Misc. 2d 25 (1976).

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. Cissna Park State Bank v. Johnson, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

Where lessee and sub-lessee executed release of sub-lease and, as part of the consideration for such release, sub-lessee executed promissory note payable to lessee, fact that note was executed one week after release did not raise defense of failure or want of consideration; under UCC § 3-408 no consideration is necessary for instrument or obligation thereon given in payment of or as security for antecedent obligation of any kind. Smith v. Rothstein, 131 Ga. App. 632, 206 S.E.2d 592 (1974).

A promissory note given after a discharge in bankruptcy to pay the discharged debt is binding. Kay v. Golding, 4 U.C.C. Rep. Serv. 1065 (1968, NY Sup).

Although an accord and satisfaction wiped out an antecedent pecuniary obligation, a note given in exchange for a prior note in the same amount at a time when the collection of the debt was not legally enforceable, but with intent that the note itself constitute a legally enforceable obligation carried a presumption of consideration and was enforceable. Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

A note promising to pay an amount which has been discharged by bankruptcy "carries a presumption of consideration" and may be enforced. Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

26. Practice and procedure; pleadings.

In action by maker, who had apparently executed note in response to his employer's demand, to declare note unenforceable, maker sufficiently pleaded failure of consideration under UCC § 3-408, where he alleged that note was neither given for purpose of reducing some third person's debt to bank, nor for any other purpose than to prevent termination of his employment. Gerber v. First Nat'l Bank, 30 Ill. App. 3d 776, 332 N.E.2d 615, 79 A.L.R.3d 592 (1st Dist. 1975).

Defendants seeking to reopen judgment by confession on promissory note signed by them failed to allege sufficient facts to clearly show that they had defense to note based on lack of consideration under UCC § 3-307(2) where defendants were heirs of owner of automobile dealership who was indebted to plaintiff on prior promissory note, where defendants were actively managing automobile dealership after owner's death, and where defendants had paid interest owing on prior note up through date of renewal note they executed; under UCC § 3-408, note signed as security for antecedent claim or debt, even though signed by third party, needs no consideration, and defendants failed to demonstrate that note signed by them was not given as security for antecedent debt of deceased owner. First Nat'l Bank v. Achilli, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

Although want or failure of consideration may be raised in action upon negotiable instrument against any person not having rights of holder in due course, this must be pleaded as affirmative defense and may not be raised under general denial. Rochester Iron & Metal Co. v. Capellupo, 62 Misc. 2d 264 (1969).

A trial was required and plaintiff should be required to file a reply where the defendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

27. —Burden of proof.

In action by hospital on promissory note signed by physician allegedly for advances made by hospital under oral agreement concerning physician's income, (1) despite conflicts in evidence as to meaning of agreement and conditions under which advances would have to be repaid, fact remained that defendant had signed note after conference with hospital's business manager concerning amount owed hospital for advances; (2) under UCC § 3-307(2), production of a note with defendant's signature established entitles a plaintiff to recover in the absence of any defense to the instrument; (3) under UCC § 3-408, since consideration for a note given for an antecedent obligation is presumed, defendant had burden of showing lack of consideration for note sued on; and (4) in view of state of record on appeal, reviewing court could not conclude that trial court's judgment in favor of hospital was contrary to manifest weight of the evidence. Northlake Community Hosp. v. Cadkin, 55 Ill. App. 3d 344, 370 N.E.2d 1094 (1st Dist. 1977).

In action arising over promissory note executed by decedent and made payable to his sister, under UCC § 3-408 burden of proving no consideration was upon executor of Thaker's estate, and in absence of fraud or undue influence, it was assumed that decedent thought that face value of note was reasonable and adequate estimate of his obligation to payee. Harned v. Dawson, 505 S.W.2d 174 (Ky. 1974).

28. —Parol evidence.

In action by payee against maker of promissory note, maker was entitled under UCC § 3-306(c) and UCC § 3-408 to show by parol evidence that consideration for note had failed allegedly because of payee's failure to fulfill obligations under business agreement with maker (reversing summary judgment for payee because material issue of fact existed as to alleged failure of consideration for note). Ralph Stachon & Assocs. v. Greenville Broadcasting Co., 35 N.C. App. 540, 241 S.E.2d 884 (1978).

In action by payee against makers of promissory note, payee could not successfully contend that trial court's inappropriate charge to jury on failure of consideration was so prejudicial as to require new trial, even though record revealed that there was no evidence to support such charge, where charge was based on UCC § 3-408 and only testimony in case concerning consideration was that plaintiff had paid debt of defendants and had taken their note in return. Applying such evidence to the charge, jury could only have concluded that there was no failure of consideration. Stembridge v. Simmons, 143 Ga. App. 90, 237 S.E.2d 514 (1977).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. Jamaica Tobacco & Sales Corp. v. Ortner, 70 Misc. 2d 388 (1972).

Where the parol evidence rule bars proof of an alleged promise, that promise cannot be consideration to support a note. Sonnichsen v. Streeter, 4 Conn. Cir. Ct. 659, 239 A.2d 63 (1967).

Parol evidence is admissible not to alter the terms of an accord and satisfaction but to show what consideration was given for a note which was given as part of the accord and satisfaction. Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

29. —Instructions.

Trial judge did not err in refusing to give instruction on defense of partial failure of consideration, where maker of note failed to plead this defense, took position at trial that note was given for entirely different reason from that claimed by payee, and based his case on fraud and want of consideration. Holm v. Woodworth, 271 So. 2d 167 (Fla. App. 1972).

30. —Summary judgment.

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. Viracola v. Dallas Int'l Bank, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

Maker of note stated in affidavit that he was not indebted to payee at time of execution of note and that payee's records showing indebtedness were incomplete and incorrect; held, there was genuine issue of fact as to consideration so that payee was not entitled to summary judgment. Preston & Fogarty, Inc. v. Morgan, 120 Ga. App. 878, 172 S.E.2d 319 (1969).

Fact that assumption agreement with bank was under seal does not defeat debtor's right to plead and prove want of consideration; in such case, law presumes consideration and burden is upon debtor to prove otherwise; held, factual question as to whether evidence presented sustained defense precluded summary judgment. Wenke v. Norton, 120 Ga. App. 70, 169 S.E.2d 663 (1969).

31. —Waiver and estoppel.

Under Texas UCC, where inequities asserted by comaker of note arose prior to or in connection with antecedent note, comaker waived right to urge these matters by execution of renewal notes. First Nat'l Bank v. Reglin, 266 So. 2d 252 (La. App. 1972).

IV. DECISIONS UNDER FORMER STATUTES.

32. Decisions under former Code 1942 § 65.

A note credited to the maker's account for goods purchased, and one given in renewal, are supported by a consideration. Stribling Bros. Stribling Bros. Mach. Co. v. Girod Co., 239 Miss. 488, 124 So. 2d 289 (1960).

A debtor by admitting that he signed a promissory note assumed the burden of showing a lack or failure of consideration. Bleuler v. Indian Co., 237 Miss. 574, 115 So. 2d 537 (1959).

Where the most that a debtor could have claimed was that his liability was doubtful, creditor's forbearance to sue was a sufficient consideration to support a promissory note. Bleuler v. Indian Co., 237 Miss. 574, 115 So. 2d 537 (1959).

Burden of proving want of consideration was on person whose name appeared on note apparently as comaker. Milstead v. Maples, 180 Miss. 476, 177 So. 790 (1938).

33. Decisions under former Code 1942 § 66.

A note credited to the maker's account for goods purchased, and one given in renewal, are supported by a consideration. Stribling Bros. Stribling Bros. Mach. Co. v. Girod Co., 239 Miss. 488, 124 So. 2d 289 (1960).

Generally, an agreement or promise by the debtor or maker to pay interest to accrue in the future, during the time extended, or for a fixed time, and by which he waives or relinquishes his right to discharge the debt before the expiration of the time specified, constitutes a sufficient consideration for an extension by the holder or payee. Freeman v. Truitt, 238 Miss. 623, 119 So. 2d 765 (1960).

An agreement indorsed on the back of a promissory note payable in full on a certain date, and signed by the maker, by the terms of which the maker agreed to pay the obligation in monthly instalments until the whole obligation plus interest had been paid, was based on sufficient consideration to bind both parties. Freeman v. Truitt, 238 Miss. 623, 119 So. 2d 765 (1960).

Note given by seller of business, after reacquiring it, for goods sold by his supplier to purchasers of business in ignorance of the change of ownership held supported by a sufficient consideration. Bleuler v. Indian Co., 237 Miss. 574, 115 So. 2d 537 (1959).

Where the most that a debtor could have claimed was that his liability was doubtful, creditor's forbearance to sue was a sufficient consideration to support a promissory note. Bleuler v. Indian Co., 237 Miss. 574, 115 So. 2d 537 (1959).

That principal gave agent credit for amount of third person's check to agent constituted consideration sufficient to render principal "holder for value." Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent crediting agent's account therefor. Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

Statute providing antecedent debt constitutes value held inapplicable, where trustee wrongfully canceled trust deed and took trust deed payable to himself which he assigned as security for his preexisting debts. Eagle Lumber & Supply Co. v. De Weese, 163 Miss. 602, 135 So. 490 (1931).

34. Decisions under former Code 1942 § 67.

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank, a purchase order signed by the maker-purchaser in favor of the seller-payee on the reverse side of which there was a "warranty and agreement" did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. Misso v. National Bank of Commerce, 231 Miss. 249, 95 So. 2d 124 (1957).

That principal gave agent credit for amount of third person's check to agent constituted consideration sufficient to render principal "holder for value." Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent crediting agent's account therefor. Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

35. Decisions under former Code 1942 § 69.

Partial failure of consideration is defense pro tanto. Coulson v. Stevens, 122 Miss. 797, 85 So. 83 (1920).

RESEARCH REFERENCES

ALR. When is instrument issued or transferred for "value" under UCC § 3-303. 77 A.L.R.5th 429.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

(1) On the day after the day demand for payment is duly made;

(2) If the instrument is a check, ninety (90) days after its date; or

(3) If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

SOURCES: Former § 75-3-304: Codes, 1942, § 41A:3-304; Laws, 1966, ch. 316, § 3-304; Laws, 1992, ch. 420, § 30, eff from and after January 1, 1993.

§ 75-3-305. Defenses and claims in recoupment.

(a) Except as otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to

enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 75-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

SOURCES: Former § 75-3-305: Codes, 1942, § 41A:3-305; Laws, 1966, ch. 316, § 3-305; Laws, 1992, ch. 420, § 31; Laws, 2010, ch. 506, § 17, eff from and after July 1, 2010.

JUDICIAL DECISIONS

1. Holder in due course.

In a case alleging predatory lending practices, a creditor was not liable for the alleged improprieties of a predecessor in interest because it was a holder in due course; there was uncontested evidence that the creditor purchased the rights to a promissory note for value, in good faith, and without notice of the impropriety. Stuckey v. Provident Bank, 912 So. 2d 859 (Miss. 2005).

RESEARCH REFERENCES

ALR. What constitutes "dealing" under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt. 42 A.L.R.5th 137.

Duress, incapacity, illegality, or similar defense rendering obligation a nullity as affecting enforceability of negotiable instrument against holder in due course under UCC (Rev) § 3-305(a)(1)(ii). 89 A.L.R.5th 577.

§ 75-3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

SOURCES: Former § 75-3-306: Codes, 1942, § 41A:3-306; Laws, 1966, ch. 316, § 3-306; Laws, 1992, ch. 420, § 32, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-304.

11. In general.
12. Incomplete, forged, altered or irregular instruments.
13. Notice of voidability or discharge of obligation.
14. Knowledge of negotiation by fiduciary in breach of duty.
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16. Knowledge that instrument is antedated or postdated.
17. Knowledge of collateral agreement.
18. Knowledge of completion of incomplete instrument.
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21. Miscellaneous circumstances as constituting notice.

III. DECISIONS UNDER FORMER STATUTES.

22. Decisions under former Code 1942 § 86.
23. Decisions under former Code 1942 § 93.
24. Decisions under former Code 1942 § 96.
25. Decisions under former Code 1942 § 100.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-304.

11. In general.

Negligence goes to notice requirements for being a holder in due course and not to good faith requirement. Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

In action by customer against bank for conversion, allegations in answer to (1) the authority of customer's employee to indorse tax payable to his corporate employer was limited to "the purpose of depositing the checks in plaintiff's bank account," and (2) that plaintiff was negligent in failing to supervise the activities of its employee and in permitting the particular occurrences, including the alleged unauthorized indorsement of the checks payable to the plaintiff, were insufficient and would be dismissed. Rosenthal v. Manufacturers Hanover Trust Co., 30 A.D.2d 650 (1st Dep't 1968).

Actual knowledge by holder of discounted notes that payee had agreed with maker not to discount notes would not preclude holder from becoming holder in due course, since knowledge was not notice of defense or claim against notes within Code § 3-304(4)(b) but merely notice of maker's possible cause of action against payee for breach of agreement not discount. Factors & Note Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

UCC § 3-304(1)(a) replaces the provision of the NIL requiring that an instrument be "complete and regular on its face". National State Bank v. Kleinberg, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

12. Incomplete, forged, altered or irregular instruments.

Statements on certificates of deposit that they were payable "none months after date" and were to bear interest "at the rate of none per cent" did not constitute sufficient irregularity under UCC § 3-304(1)(a) to create genuine issue regarding holder's status as holder in due course, notwithstanding claim by issuer of certificates that these terms so deviated from custom or usage in banking industry as to constitute such irregularity, where issuer failed to establish existence of any such alleged custom or usage. Western State Bank v. First Union Bank & Trust Co., 172 Ind. App. 321, 360 N.E.2d 254 (1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank under UCC § 3-304 was without notice of buyer's alleged defenses (fraud, conversion, and breach of contract) to liability on cashier's checks-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) bank's knowledge that contract of sale accompanied cashier's checks did not constitute notice of buyer's alleged defenses to such checks under "separate agreement" provision of UCC § 3-304(4)(b); (2) bank could reasonably assume that one note discharged by checks' proceeds, although signed by corporation's owner personally, was for benefit of corporation and that application of proceeds to discharge such note pursuant to owner's instructions did not constitute discharge of owner's personal debt, so as to give bank notice under UCC § 3-304(2) of buyer's defenses to liability on checks; and (3) fact that contract of sale was materially altered by striking bank's name from two copies thereof did not give bank notice of buyer's defenses under UCC § 3-304(1)(a), since term "instrument" in UCC § 3-304(1)(a) means "negotiable instrument" and not "contract of sale." Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Affirmative defense to action against bank for conversion alleging that the authority of corporate employee to indorse checks payable to his corporate employer was limited to "the purpose of depositing the checks in plaintiff's bank account" was insufficient. Rosenthal v. Manufacturers Hanover Trust Co., 30 A.D.2d 650 (1st Dep't 1968).

Where at the time a note was negotiated to a bank it was overdue as originally drafted, the bank might still claim the status of a holder in due course and enforce the note if it came to the bank in such a condition that the alteration of the maturity date was not noticeable. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

Bank which permitted new president and sole stockholder of corporation to cash checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit, and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it permitted sole stockholder to cash rather than deposit to corporation's account. Maley v. East Side Bank, 361 F.2d 393 (7th Cir. Ill. 1966).

13. Notice of voidability or discharge of obligation.

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCS 1703(b)), should have alerted assignee to possible irregularities in making of note. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

In declaratory action to determine rights of holder of promissory note, where (1) maker of note on May 23, 1971 signed contract to purchase lot, received deed to lot, and executed mortgage on lot and note in certain sum payable to named person, which note was substantially discounted and immediately sold to plaintiff; (2) maker rescinded the voidable sales contract two days later, as permitted by federal Interstate Land Sales Full Disclosure Act (15 USCS § 1703(b)), because of his failure to receive property report on lot as of time of signing contract of sale; and (3) maker contended that plaintiff holder had had notice within meaning of UCC § 3-304(1)(b) that maker's obligation under such contract was voidable, plaintiff holder was not holder in due course under UCC § 3-302(1)(c) because (1) plaintiff's purchase of note for much less than its full value should have alerted him to possible defense against maker's liability; (2) note was also purchased by plaintiff within the two-day period in which maker could rescind the voidable sales contract; (3) by examining such contract, which was in possession of seller of note, plaintiff could have ascertained that maker of note had not inspected the lot purchased or received a property report thereon, as required by federal law; and (4) under circumstances of case, trial court could reasonably infer bad faith on part of plaintiff in refusing to investigate when facts known to him indicated irregularity respecting such note. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

14. Knowledge of negotiation by fiduciary in breach of duty.

Where (1) plaintiff corporation sent defendant bank executed form and corporate resolution listing plaintiff's accountant as authorized signer of checks against plaintiff's account, (2) plaintiff directed that bank statements and inquiries about account should be sent to accountant, (3) non-UCC banking law provided that notwithstanding UCC § 3-304 (dealing with purchaser's notice of claim to or defense against instrument), drawing of check by corporate agent against corporate account-either in corporation's name or in agent's name to himself as payee-and cashing of check or depositing it in agent's personal account should not constitute notice to bank of defense against or claim to check, provided that bank had on file corporation's authorization showing that agent was authorized to draw checks for limited or unlimited amount and that amount of check cashed or deposited did not exceed such amount, and (4) plaintiff's account between 1968 and 1972 signed many checks against corporation's account and thus converted large sums of money to his own use, court held in action to recover such sums on theory of negligence that clause in UCC § 4-103(1), providing that no agreement can disclaim bank's responsibility for its failure to exercise ordinary care, was not controlling since plaintiff, as permitted by UCC § 4-103(1), had agreed to standard by which defendant's responsibility as to checks drawn against plaintiff's account was to be measured when plaintiff filed signed authorization with bank concerning accountant's authority to draw checks, and checks drawn by accountant had not exceeded maximum limitation contained in such authorization. Allen A. Funt Prods., Inc. v. Chemical Bank, 63 A.D.2d 629 (1st Dep't 1978), aff'd, 47 N.Y.2d 741, 417 N.Y.S.2d 254, 390 N.E.2d 1178 (1979).

Defendants, the limited partners in a partnership formed by the corporate developer of an apartment house project to syndicate the sale of the project, who executed personal promissory notes to the partnership as part of the purchase price for their shares in the partnership of which the corporate developer was the sole general partner and managing agent, may raise as a defense against plaintiff bank in an action on the notes the breach of fiduciary duty by the general partner, which, after first approaching plaintiff bank for a corporate loan, indorsed the notes from the partnership to itself in its corporate capacity and then to plaintiff without the written consent or ratification of all the limited partners in violation of section 98 of the Partnership Law, since plaintiff, by purchasing the notes at a discount with knowledge that the notes were negotiated for the individual purposes of the general partner in breach of its fiduciary duty, is not entitled to the rights of a holder in due course (Uniform Commercial Code, § 3-304, subd [2]). The defense of breach of fiduciary duty belongs to defendants as limited partners and makers of the notes and not to the partnership since defendants, who have each been damaged by the breach of the fiduciary duty and stand to lose part of their interest in the partnership assets, are asserting their own rights and not the "claim of any third person". Chemical Bank v. Ashenburg, 94 Misc. 2d 64 (1978).

Bank which cashed check payable to order of "Swiss Baco Skyline, 2416 Holly Lane, Olympia, Wa 98501," where such check was indorsed by alleged converter who wrote "Swiss Baco Skyline" on back of check and signed his name thereafter, was liable as matter of law to payee of check for failing to act in accordance with reasonable commercial standards in accepting check, since bank was deemed to have had notice under UCC § 3-304(2) of claim against instrument because of its knowledge that indorser, although purporting to act in name of payee, actually negotiated check in exchange for personal certificate of deposit. Swiss Baco Skyline Logging, Inc. v. Haliewicz, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Bank which was authorized depositary of plaintiff company was liable for face amount of 17 third-party checks made payable to plaintiff which were indorsed without authority by plaintiff's manager and deposited in manager's personal account, since bank under UCC § 3-304(2) had notice of plaintiff's claim against checks as payee thereof and thus could not claim benefits of holder-in-due-course status under UCC § 3-302(1). Mott Grain Co. v. First Nat'l Bank & Trust Co., 259 N.W.2d 667 (N.D. 1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee fact that information relating to employee's relationship with plaintiff was provided in financial statements given to merchants from whom bank purchased installment contract was insufficient to constitute "notice" to defendant of fiduciary relationship between employee and plaintiff, but, even if it were, under UCC § 3-304(4)(e), this was not sufficient knowledge to place defendant on "notice" of claim or defense to check. Richardson Co. v. First Nat'l Bank, 504 S.W.2d 812 (Tex. Civ. App. 1974), ref. n.r.e (Apr. 3, 1974).

Where bookkeeper deposited third party checks payable to her employer in her personal bank account, defendant bank was not holder in due course, since it had notice of claim against instrument arising out of bookkeeper's acting for her own benefit, and since it was not a holder for value not having acquired the checks by authorized signature or indorsement. Von Gohren v. Pacific Nat'l Bank, 8 Wash. App. 245, 505 P.2d 467 (1973).

15. Overdue instrument.

In action by holder of note against makers who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder's taking of note dated June 30, 1972, on July 14, 1972, was within "a reasonable length of time after its issue" under UCC § 3-304(3)(c); and (3) since note was not overdue when holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and 3-415(2). Gill v. Commonwealth Nat'l

Bank, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

Taking of demand note dated June 30, 1972, on July 14, 1972, was within "reasonable length of time after its issue" under UCC § 3-304(3)(c) as matter of law. Gill v. Commonwealth Nat'l Bank, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

Where, by terms of note, holder had reason to know, that note was past due when taken, holder of note was not holder in due course. Srochi v. Kamensky, 118 Ga. App. 182, 162 S.E.2d 889 (1968).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

A bank which for the second time accepted for deposit to the personal account of the officer of a corporation in receivership a long past due check payable to the corporation's order, at a time when the bank had knowledge of the receivership, could not be a holder in due course when the drawee bank again refused payment. County Trust Co. v. Pascack Valley Bank & Trust Co., 93 N.J. Super. 252, 225 A.2d 605 (App. Div. 1966).

16. Knowledge that instrument is antedated or postdated.

Since UCC § 3-304 specifically provides that knowledge that an instrument is ante-dated or post-dated does not of itself give purchaser notice of defense or claim, knowledge on part of collecting bank that check it accepted for deposit was post-dated imposed no duty on bank to make any investigation to ascertain whether or not maker had any defenses which would have justified him in refusing to pay payee; thus, negligence of collecting bank in failing to make investigation to ascertain reason check was post-dated could not constitute defense to bank's cause of action against maker where bank accepted post-dated check for deposit and permitted its depositor to withdraw funds prior to collection of check, and where, when check was returned with stop payment notation, bank was unable to charge it back against its customer's account. First Nat'l Bank v. McKay, 521 S.W.2d 661 (Tex. Civ. App. 1975).

Where purchasers of trailer park gave vendors' agent check in acceptance of vendors' offer to sell, fact that check was postdated for one week did not make purchaser's acceptance a qualified acceptance. How v. Fulkerson, 22 Ariz. App. 467, 528 P.2d 853 (1974).

Knowledge that a check is postdated does not of itself give the purchaser notice of a defense or claim. National Currency Exch., Inc. v. Perkins, 52 Ill. App. 2d 215, 201 N.E.2d 668 (1st Dist. 1964).

17. Knowledge of collateral agreement.

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank under UCC § 3-304 was without notice of buyer's alleged defenses (fraud, conversion, and breach of contract) to liability on cashier's checks-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) bank's knowledge that contract of sale accompanied cashier's checks did not constitute notice of buyer's alleged defenses to such checks under "separate agreement" provision of UCC § 3-304(4)(b); (2) bank could reasonably assume that one note discharged by checks' proceeds, although signed by corporation's owner personally, was for benefit of corporation and that application of proceeds to discharge such note pursuant to owner's instructions did not constitute discharge of owner's personal debt, so as to give bank notice under UCC § 3-304(2) of buyer's defenses to liability on checks; and (3) fact that contract of sale was materially altered by striking bank's name from two copies thereof did not give bank notice of buyer's defenses under UCC § 3-304(1)(a), since term "instrument" in UCC § 3-304(1)(a) means "negotiable instrument" and not "contract of sale." Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Assignee's knowledge that incomplete security agreement covering conditional sale had been completed was not notice of maker's defense on agreement unless assignee had notice of improper completion. Steelman v. Associates Disct. Corp., 121 Ga. App. 649, 175 S.E.2d 62 (1970).

Actual knowledge by holder of discounted notes that payee had agreed with maker not to discount notes would not preclude holder from becoming holder in due course, since knowledge was not notice of defense or claim against notes within Code § 3-304(4)(b) but merely notice of maker's possible cause of action against payee for breach of agreement not discount. Factors & Note Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

18. Knowledge of completion of incomplete instrument.

Under UCC § 3-304(4)(f), knowledge by purchaser of instrument that there has been default in payment of any other instrument, except one of the same series, does not of itself give purchaser notice of any defense against, or claim to, instrument purchased; and under UCC § 3-304(4)(d), knowledge that incomplete instrument has been completed also does not create notice of such a defense or claim, unless purchaser had notice that completion was improper. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

Purchaser of conditional sales contract was holder in due course, even though he knew that possessor of contract had filled in blanks therein after contract had been signed. Cook v. Southern Credit Corp., 247 Ark. 981, 448 S.W.2d 634 (1970).

19. Duty to make inquiry.

Notice under UCC § 3-302(1)(c) and UCC § 3-304(1)(b) requires some inquiry by purchaser of note where purchaser has actual knowledge of facts that should alert him to possible irregularities concerning such note. Protection afforded holder in due course cannot be used to shield one who simply refuses to investigate when facts known to him suggest an irregularity concerning commercial paper that he purchases. Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

Where drawer gave third party his signed blank check with instructions to cash it for $800 and give cash to hotel in payment of hotel bill, but third party made check out for full amount of bill, $3046.03, and delivered it to hotel, fact that check was signed by person who was not party to transaction and that it was completed in different handwriting from that of person who signed check, did not impose any duty on hotel under UCC § 3-304(4)(d) to inquiry as to third party's authority. Saka v. Sahara-Nevada Corp., 92 Nev. 703, 558 P.2d 535 (1976).

With respect to Code definition of holder in due course as holder who takes instrument without "notice" of any defense against or claim to it on part of any person, failure to make inquiry about unknown fact may be negligence and lack of diligence, but it is not "notice" of what holder might discover. Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 207 N.W.2d 282 (1973).

Where the acquirer of a negotiable instrument has no reason to know of anything improper, he is not required to inquire as to all prior transactions in order that he be deemed to have acted honestly and in good faith. Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605 (1967).

20. Effect of time of notice.

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors, drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for $13,430 but check imprinter inadvertently entered "$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite $10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. McCook County Nat'l Bank v. Compton, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

The fact that the transferor-payee was insolvent is not notice of any defense, as against the contention that because the transferor was insolvent the transfer might give rise to a preference, or that the transferor would not be able to pay the note. Franklin Nat'l Bank v. Sidney Gotowner, Inc., 4 U.C.C. Rep. Serv. 953 (1967, NY Sup).

Notice, in order to prevent one from being bona fide holder under law merchant, or holder in due course under Commercial Code, means notice at time of taking or at time instrument is negotiated, and not notice arising subsequently; time when value is given for instrument is decisive. Sullivan v. United Dealers Corp., 486 S.W.2d 699 (Ky. 1972).

Where, after bank perfected security interest in company's accounts and their proceeds, company induced debtor to pay his account by giving promissory note for amount owed, and negotiated this note to defendant, defendant did not have actual notice of bank's security interest, was holder in due course, and had priority with respect to note and cash payment over bank's earlier perfected security interest. Citizens Valley Bank v. Pacific Materials Co., 263 Or. 557, 503 P.2d 491 (1972).

Lender who claimed to be purchaser of note from broker was charged with notice of defense of usury, where usurious note for $16,260 was purchased from broker for $11,000. Winter & Hirsch, Inc. v. Passarelli, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1st Dist. 1970).

The fact that subsequent to the paying of value the payee learns of a defense does not operate retroactively to destroy his character as a holder in due course. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Under the provisions of subsec. (6), subsequent knowledge does not impair holder-in-due-course status. Crest Fin. Co. v. First State Bank, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

21. Miscellaneous circumstances as constituting notice.

Subcontractor's delivery of certificate of deposit to attorney, as alleged escrow agent, was not delivered to general contractor and thus general contractor did not perfect security interest in certificate prior to four months statutory period preceding subcontractor's bankruptcy where, inter alia, during time that certificate was in possession of attorney, interest was paid to subcontractor rather than general contractor, and where, although attorney was attorney to whom general contractor normally referred its legal matters, attorney also did some legal work for subcontractor. Stein v. Rand Constr. Co., 400 F. Supp. 944 (S.D.N.Y. 1975).

Where the payee of a note gave the required notice of acceleration upon default, acceptance by the payee of late payments without the required interest, after notice of the acceleration, did not cure default and did not bar acceleration.

Colonie Block & Supply Co. v. D.H. Overmyer Co., 35 A.D.2d 897 (3d Dep't 1970).

Where the defendant executed a promissory note on February 10, 1964 and subsequently on April 15, 1964 incorporated his construction business, plaintiff who was the holder, but not a holder in due course, of the note was subject to the defense of novation, and proof of that defense was not precluded by the parol evidence rule or the Statute of Frauds. Miles v. Houghtaling, 32 A.D.2d 714 (3d Dep't 1969).

That its depositor's account is low in funds, or even overdrawn, does not constitute notice to a collecting bank of an infirmity in the underlying transaction or instrument, and is not evidence of bad faith chargeable to it at the time it permitted withdrawals against the deposited check. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

III. DECISIONS UNDER FORMER STATUTES.

22. Decisions under former Code 1942 § 86.

Holder's positive testimony, together with presumption of indorsement before instrument was overdue, could not be overcome by appearance of ink indorsement on back of note. Gibbons v. Longino & Reid, 153 Miss. 749, 121 So. 490 (1929).

Burden on maker to overcome presumption that undated endorsement of negotiable note was made before maturity. Union Station Trust Co. v. Bostick, 133 Miss. 627, 98 So. 105 (1923).

23. Decisions under former Code 1942 § 93.

Where the evidence is in dispute as to whether the holder of a note had notice of any infirmity in the instrument at the time of its acquisition, or had knowledge of facts which would amount to his acquiring it in bad faith, the issue was for the jury to decide. Buntin v. Katz, 252 Miss. 768, 173 So. 2d 659 (1965).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank a purchase order signed by the maker-purchaser in favor of the seller-payee, on the reverse side of which there was a "warranty and agreement," did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. Misso v. National Bank of Commerce, 231 Miss. 249, 95 So. 2d 124 (1957).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

Defense of fraud to other notes purchased from same payee was not notice to due course holder of invalidity of particular notes. Lamar v. Security Fin. Co., 147 Miss. 658, 112 So. 577 (1927).

24. Decisions under former Code 1942 § 96.

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. Garnett v. Associates Disct. Corp., 233 Miss. 849, 103 So. 2d 368 (1958).

Fraudulent representations upon which a party may predicate any demand for relief must relate to past or presently existing facts, as facts, and cannot consist of promises except in some cases when a contractual promise is made with the present undisclosed intention of not performing it. Salitan v. Horn, 212 Miss. 794, 55 So. 2d 444 (1951).

Fraud is never presumed, but must be directly and specifically charged and clearly proven. Salitan v. Horn, 212 Miss. 794, 55 So. 2d 444 (1951).

Negotiation of note by maker in violation of conditions and agreement of parties to note held breach of faith, rendering maker's title defective. Cassedy v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

Where title of one negotiating note was defective, holders had burden of proving they were holders in due course. Cassedy v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

25. Decisions under former Code 1942 § 100.

The maker's defenses to the payment of a promissory note to the effect that the tractor, the purchase price of which was represented by the promissory note, was defective and was returned to the seller for repairs and thereafter seized in a suit filed against the seller by a finance company, were unavailable against the plaintiff bank which was a holder in due course of the paper. First Nat'l Bank v. Marcinkowska, 279 F. Supp. 251 (N.D. Miss. 1967).

In order to make a charge of fraud perpetrated upon the makers of a promissory note applicable to an assignee of the note's payee, and thereby defeat the assignee's right of recovery, it would be necessary to show that assignee participated in or had actual knowledge of the fraud. Nash v. Homeowners Mtg. Corp., 194 So. 2d 211 (Miss. 1967).

The holder of a promissory note transferred by limited indorsement, which set forth the payee's warranty that the consideration for which the note was given had been performed, was entitled to recover against the makers, in the absence of proof of knowledge that the warranty statement was false. Nash v. Homeowners Mtg. Corp., 194 So. 2d 211 (Miss. 1967).

Where the evidence is in dispute as to whether the holder of a note had notice of any infirmity in the instrument at the time of its acquisition, or had knowledge of facts which would amount to his acquiring it in bad faith, the issue was for the jury to decide. Buntin v. Katz, 252 Miss. 768, 173 So. 2d 659 (1965).

Whether or not one is a holder in due course does not depend upon his diligence or negligence. Securities Inv. Co. v. Cohen, 241 Miss. 549, 131 So. 2d 439 (1961).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. Garnett v. Associates Disct. Corp., 233 Miss. 849, 103 So. 2d 368 (1958).

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. American Book Co. v. White Sys. of Jackson, 223 Miss. 510, 78 So. 2d 582 (1955).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank, and with whose signature it is not familiar and under no duty to become familiar. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed the check for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed bank had not reimbursed its depositor. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where credit association was induced to make loan to property owner's brother on the latter's representation that he was owner of the property, which was used as security, and the association's agent informed a merchant of the loan and asked him to cash the loan check, which was issued in the name of the real owner of the property, the association, its agent and the merchant all believing that the name of the borrower was that appearing on the check, although he was known by a different name, the merchant, in cashing the check upon indorsement by the borrower in the name appearing on the check, was acting in good faith, and so was not chargeable under the statute relating to notice of infirmity in a negotiable instrument or of defect of title of the person negotiating it. Hattiesburg Prod. Credit Ass'n v. McNair, 193 Miss. 615, 10 So. 2d 97 (1942).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

There was no bad faith imputable to purchaser of trust deed and note because purchaser saw affidavit by makers that there was no infirmity. Guaranty Inv. & Loan Co. v. Stevens, 161 Miss. 473, 137 So. 335 (1931).

No bad faith could be imputed to purchaser of note and trust deed because payee sold them without making profit. Guaranty Inv. & Loan Co. v. Stevens, 161 Miss. 473, 137 So. 335 (1931).

Where one negotiating loan charged usurious commission, purchaser of notes and trust deed and its assignee held to be holders in due course. Guaranty Inv. & Loan Co. v. Stevens, 161 Miss. 473, 137 So. 335 (1931).

Defenses existing between buyer of automobile on conditional sale and original seller, growing out of alleged defects as to car, were not available to buyer in action on the note by the holder, which had purchased it for value and without notice. Commercial Credit Co. v. Summers, 154 Miss. 501, 122 So. 541 (1929).

Evidence held not to show bad faith on part of one buying notes which had been altered after delivery. Gibbons v. Longino & Reid, 153 Miss. 749, 121 So. 490 (1929).

Purchaser's knowledge that stock for which note was executed was valueless at time of purchase held no defense. McAnge v. Falls, 145 Miss. 471, 110 So. 840 (1927).

Purchaser of trade acceptances not charged with notice of defects in title because of margin indicating clipping from other paper. Crane v. Guaranty Fin. Corp., 141 Miss. 692, 105 So. 485 (1925).

Maker of note bearing date of secular day is estopped as against innocent holder to show execution on Sunday. Currie-McGraw Co. v. Friedman, 135 Miss. 701, 100 So. 273 (1924).

§ 75-3-307. Notice of breach of fiduciary duty.

(a) In this section:

(1) "Fiduciary" means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) is owed.

(b) If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.

(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.

(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

SOURCES: Former § 75-3-307: Codes, 1942, § 41A:3-307; Laws, 1966, ch. 316, § 3-307; Laws, 1992, ch. 420, § 33, eff from and after January 1, 1993.

§ 75-3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under Section 75-3-402(a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under Section 75-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

SOURCES: Laws, 1992, ch. 420, § 34, eff from and after January 1, 1993.

Cross References — Application of this section upon proof, by person seeking enforcement of instrument under subsection (a) of § 75-3-309, of terms of instrument and person's right to enforce it, see § 75-3-309.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-307.

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III. DECISIONS UNDER FORMER STATUTES.

28. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-307.

11. In general.

In action on note against corporation in which defendant contended that procedural rule-which provided that when a claim is founded on written instrument that is set out at length in the pleading, instrument's execution is deemed confessed unless party charged with executing instrument specifically denies its execution-was not controlling by virtue of UCC § 3-307(1)(b) in case where signer of instrument has died, court held (1) that there was no merit in such contention because defendant was corporation and had not died, and (2) that UCC § 3-307(1) was also inapplicable because defendant did not specifically deny signature on note in its pleadings, as required by UCC § 3-307(1). Hudspeth v. Tree Mart, Inc., 573 S.W.2d 697 (Mo. Ct. App. 1978).

Subsection (3) of this section is comparable to § 59 of the Uniform Negotiable Instruments Law (repealed § 82 of C 107, Annotated Laws of Massachusetts). Elbar Realty, Inc. v. City Bank & Trust Co., 342 Mass. 262, 173 N.E.2d 256 (1961).

12. Applicability.

Under UCC § 3-307(2), the defendant has the burden of establishing any defenses to liability on the instrument. American State Bank v. Richendifer, 36 Or. App. 199, 584 P.2d 323 (1978).

Under UCC § 3-307(2), the burden of establishing, by a preponderance of the evidence, the defense of failure of consideration for an instrument is on the person asserting such defense. Oak Trust & Sav. Bank v. Annerino, 64 Ill. App. 3d 1030, 381 N.E.2d 1389 (1st Dist. 1978).

In action on promissory note given in payment of real estate brokerage commission, since contract sued on was that of the note and not the brokerage contract, action was for enforcement of note's obligations and thus was governed by UCC § 3-307(2), providing that when signatures are admitted or established, production of instrument entitles holder to recover on it unless defendant establishes defense. Azar-Beard & Assocs. v. Wallace, 146 Ga. App. 671, 247 S.E.2d 154 (1978).

Although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer from Pakistani seller, constituted "fraud in the transaction" within meaning of UCC § 5-114(2), Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114(2), i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

Where the sole issue in an action brought upon a check was whether the signature of one or two of the corporate drawer's officers were required for validity, and the single signature appearing on the instrument, was admittedly an authorized signature, this section did not apply. New Waterford Bank v. Morrison Buick, Inc., 38 Pa. D. & C.2d 371 (1965).

13. Requirement of specific denial.

In action by bank against guarantor of note, where answer of guarantor did not specifically deny signature on instrument, pursuant to UCC §§ 3-307(1) signature on note was admitted. Lipton v. Southeast First Nat'l Bank, 343 So. 2d 927 (Fla. App. 1977).

Under UCC § 3-307(1), specific denial of validity of signatures on promissory note was required to place due execution of instrument in issue. Loveless v. Texas First Mtg. Reit, 531 S.W.2d 870 (Tex. Civ. App. 1975).

Under UCC § 3-307, cognovit note which apparently was signed by secretary of corporation was prima facie valid and binding on corporation; thus, corporation was not entitled to relief from confessed judgment on note where in its motion, affidavit, and proposed answer there was no denial that secretary's signature was authorized nor did affidavit set forth facts sufficient to support finding that signature was not authorized; as a result, corporation must be deemed to have admitted that signature of secretary was authorized. Burkett v. Finger Lake Dev. Corp., 2 Ill. App. 3d 396, 336 N.E.2d 628 (5th Dist. 1975).

Under Code section providing that unless specifically denied in pleading each signature on instrument is admitted, defendant's general denial in action on promissory notes had legal effect of admitting their signatures on notes and payee's indorsement of notes to plaintiff bank. Farmers & Merchants State Bank v. Mann, 87 S.D. 90, 203 N.W.2d 173 (1973).

In an action on a promissory note, the signature of the maker, unless specifically denied in the pleadings, is deemed admitted under UCC § 3-307. Wildfang Miller Motors, Inc. v. Rath, 198 N.W.2d 210 (N.D. 1972).

In an action upon promissory notes in which the answer was a general denial that "the signature is genuine" and a demand for proof that "it" was, a ruling by the court that the denial was not a separate special demand did not harm the defendant where photocopies of the notes were admitted in evidence, thus bringing into operation the presumption of the validity of the signatures and requiring a finding for the plaintiff in the absence of evidence to the contrary, under subsections (1), (1)(b) and (2) of this section. Union Nat'l Bank v. Cannato, 350 Mass. 767, 214 N.E.2d 30 (1966).

14. Proof of genuine signature.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

Issue of genuineness of signature on check was never raised as defense, and presumption that signature was genuine was not rebutted, where alleged indorser did not deny signing check or recovering proceeds. Gonzalez v. Dumpson, 46 A.D.2d 861 (1st Dep't 1974), appeal dismissed, 36 N.Y.2d 806 (1975).

Where genuineness of signature is put in issue and purported signer has died, party claiming under signature has burden of establishing signature as genuine; held, burden not satisfied where there is no proof at all that "Joseph Carr" on note was deceased "Joseph Carr", and name is hardly uncommon one. In re Carr Estate, 436 Pa. 47, 258 A.2d 628 (1969).

15. Presumption.

The State failed to overcome the presumption in favor of the genuineness of the signatures of the named payee on State issued unemployment checks (Uniform Commercial Code, § 3-307) where the State produced the hearsay testimony of the claims examiner for the State Department of Labor who interviewed the supposed payee, an individual not personally known to her, in connection with a claim of forgery, but failed to produce any of the documents signed by the named payee in the possession of the Department of Labor allegedly forming the basis of her comparison with the signatures on the checks, and, consequently, although the signatures on the checks and the signature on the interview form signed in the presence of the State's witness are different, they bear equal claims to authenticity and, therefore, do not constitute the required firsthand evidence of forgery necessary to overcome the presumption; comparison of signatures by the court was precluded by the State's failure to produce "any writing proved * * * to be the handwriting of the person claimed to have made the disputed writing" (CPLR 4536); the State did not exercise those opportunities for self-protection available to it by not possessing properly maintained records containing an authentic signature of the named payee with which to prove the forgery. Freeman Check Cashing, Inc. v. State, 97 Misc. 2d 819 (1979).

The statutory presumption in favor of the genuineness of a signature (Uniform Commercial Code, § 3-307) aiding the holder, who has the ultimate burden of establishing the effectiveness of a disputed signature, is overcome when some evidence is introduced tending to prove each and every element of forgery; the proof need not possess any particular degree of "substantiality", persuasiveness or weight, since such tests are essentially subjective. Freeman Check Cashing, Inc. v. State, 97 Misc. 2d 819 (1979).

UCC § 3-307(1) concerns defenses when validity of signature is in issue. Purpose of section is to give presumption of validity of signature to party suing as holder to collect on note or draft, and section cannot be used to burden unnecessarily party who is bringing conversion action resulting from payment of instrument over forged indorsement. Petty v. First Nat'l Bank, 50 Ohio App. 2d 365, 363 N.E.2d 599 (1976).

In conversion action by copayee of check against drawer and bank that paid check over plaintiff's allegedly forged indorsement, where plaintiff contended that his name had been signed to such check by attorney without plaintiff's authorization, and where such attorney admitted signing plaintiff's name but claimed that he had authority to do so, defense contention that since plaintiff was disputing validity of his indorsement, he had burden of overcoming presumption created by UCC § 3-307(1) that indorsement was genuine and authorized could not be sustained because (1) all parties conceded that plaintiff's signature was not genuine, and (2) defendants, who asserted that attorney was authorized to sign plaintiff's name to check, had burden of proving such authority. Petty v. First Nat'l Bank, 50 Ohio App. 2d 365, 363 N.E.2d 599 (1976).

Under UCC § 3-307(1), where purported maker of note denied signature but introduced no evidence to support defense that signature was forged or unauthorized, presumption of validity of signature was not rebutted, and expert testimony is not required to support claim as trial judge, sitting as trier of fact, is entitled to make his own comparison of signatures and form his own opinion as to authenticity. Jax v. Jax, 73 Wis. 2d 572, 243 N.W.2d 831 (1976).

In action by bank to recover on promissory note, testimony by bank officer that he was present during taking of maker's deposition when maker denied that she signed note, even if properly admitted in evidence, was insufficient to overcome presumption of UCC § 3-307(1)(b) that her signature was genuine and, therefore, upon production of instrument, maker was liable to bank, absent any defense. Virginia Nat'l Bank v. Holt, 216 Va. 500, 219 S.E.2d 881 (1975).

In action on promissory notes purportedly bearing signatures of debtor, his wife, and his daughter, presumption that signature of daughter was genuine or authorized was sufficiently rebutted by denial by all defendants that signature on note was hers, along with her assertion that she was without knowledge of the transaction, and sample of her signature. Esposito v. Fascione, 111 R.I. 91, 299 A.2d 165 (1973).

In absence of showing that president of corporation lacked authority, actual or apparent, to bind organization, his signature on promissory note would be presumed to be authorized. B & C Enters. v. Utter, 88 Nev. 433, 498 P.2d 1327 (1972).

Statute presumes signature on negotiable instrument to be genuine or authorized. Arnold v. Bostwick Banking Co., 121 Ga. App. 131, 173 S.E.2d 236 (1970), rev'd on other grounds, 227 Ga. 18, 178 S.E.2d 890 (1970), conformed to, 123 Ga. App. 189, 179 S.E.2d 780 (1971).

In an action by the holder of a promissory note made by defendants payable to "Greenlaw & Sons Roofing & Siding Co." and indorsed "Greenlaw & Sons by George M. Greenlaw," where the defendant denied the genuineness of the indorsement but offered no evidence affecting the regularity of the indorsement, and where it did not appear that Greenlaw & Sons and Greenlaw & Son Roofing and Siding Co. were not the same company or that the indorsement by Greenlaw was in a name other than his own or under which he individually did business, there was nothing to counter the presumption of the indorsement's regularity existing under subsection (1)(b) of the instant section, the signature of Greenlaw was established under subsection (2) of the instant section, and the plaintiff as a holder within the meaning of § 1-201(20) of the instant chapter was entitled to recover. Watertown Fed. Sav. & Loan Ass'n v. Spanks, 346 Mass. 398, 193 N.E.2d 333 (1963).

16. Prima facie case for holder.

Where plaintiff payee's supporting affidavit in suit against maker and indorser of promissory note showed that there was no dispute as to genuineness of defendants' signatures, affidavit was not relied on to prove such signatures, plaintiff averred in affidavit that he saw defendants sign note, and defendants did not by counteraffidavit deny or question genuineness of their signatures, plaintiff's production of note as holder entitled it under UCC § 3-307(2) to recover on instrument. First Progressive Bank v. Griffith, 354 So. 2d 703 (La. App. 1978).

In action on note given in payment for land, where (1) note was signed by both vendees and made payable to vendor, who died thereafter, (2) vendor's wife, individually and as executrix of vendor's estate, transferred note to plaintiff, and (3) defendant vendees contended since vendor's will did not authorize executrix to sell estate's assets, her transfer of note affected only her individual half interest therein, other half interest in note was still owned by vendor's estate, and plaintiff therefore was not entitled to judgment for full amount of note, court held that judgment awarding plaintiff full amount of note was proper under (1) UCC § 3-307(2), dealing with recovery by holder on instrument as to which signatures have been established, in absence of any defense to such recovery, and (2) UCC § 3-306(d), providing that claim of third person to an instrument is not available as a defense to party liable thereon unless such third person defends action for party liable. Cowhouse Dairy, Inc. v. Agristor Credit Corp., 566 S.W.2d 339 (Tex. Civ. App. 1978).

In action by corporation and individual plaintiff, who were sole shareholders of such corporation, to recover on dishonored check made out to individual plaintiffs by one who represented defendant buyers of plaintiff corporation, where (1) plaintiffs, after being informed by defendants that check would not be honored, indorsed check to second corporation with notation, "for funds advanced," (2) second corporation indorsed check to bank for deposit only and sent check to bank for collection, (3) bank, after indorsing and sending check for collection, physically returned it after dishonor to second corporation, and (4) second corporation then physically returned it without indorsement to plaintiffs and assigned to plaintiffs all of second corporation's right, title, and interest therein, trial court properly held (1) that plaintiffs had standing to sue on check, even though they were not holders or transferees for value, since transfers specified in UCC § 3-201(1) are not limited to transfers for value, and (2) that since plaintiffs, although transferees without indorsement, proved transaction by which they had acquired check from holder, they therefore acquired rights of a holder and were entitled, on check's production, to presumption of entitlement to recovery under UCC § 3-307(2) because defendants did not establish defense to recovery. Perry & Greer, Inc. v. Manning, 282 Or. 25, 576 P.2d 791 (1978).

In suit to recover on certificate of deposit that was issued by defendant bank and assigned by holder to plaintiff, wherein defendant alleged that certificate had been purchased with proceeds of loan from defendant to insurance corporation and that when loan became a bad risk, defendant set off amount represented by certificate against such loan, court held that since defendant had failed to set forth specific facts that would place validity of certificate's assignment in issue and had also failed to deny specifically validity of signature made in connection with such assignment, production of certificate entitled plaintiff under UCC § 3-307(2) to recover thereon (also holding that summary judgment was not precluded, since defendant had presented no issue of fact that concerned validity of certificate's assignment). Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

In action by hospital on promissory note signed by physician allegedly for advances made by hospital under oral agreement concerning physician's income, (1) despite conflicts in evidence as to meaning of agreement and conditions under which advances would have to be repaid, fact remained that defendant had signed note after conference with hospital's business manager concerning amount owed hospital for advances; (2) under UCC § 3-307(2), production of a note with defendant's signature established entitles a plaintiff to recover in the absence of any defense to the instrument; (3) under UCC § 3-408, since consideration for a note given for an antecedent obligation is presumed, defendant had burden of showing lack of consideration for note sued on; and (4) in view of state of record on appeal, reviewing court could not conclude that trial court's judgment in favor of hospital was contrary to manifest weight of the evidence. Northlake Community Hosp. v. Cadkin, 55 Ill. App. 3d 344, 370 N.E.2d 1094 (1st Dist. 1977).

Plaintiffs, suing on irrevocable letters of credit under UCC § 3-307, have burden of proving holder in due course status where defendant establishes defense of fraud as to signatures on drafts. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

In action by bank to recover on two promissory notes, bank was entitled under UCC § 3-307 to summary judgment unless promisor otherwise properly established a defense, where bank established amounts due on notes and that it was owner and holder of notes, that notes were in default, and that defendant was maker of notes. Hemphill v. Greater Houston

Bank, 537 S.W.2d 124 (Tex. Civ. App. 1976).

Proof that defendant signed promissory note and that it was in possession of plaintiff constituted prima facie case that note had been duly executed and delivered, for valuable consideration, and that defendant was obligated to pay it. Cannon v. Wright, 531 P.2d 1290 (Utah 1975).

In action on promissory note where defendant raised no question as to genuineness of his signature, plaintiff's production of note and defendant's concession as to amount due entitled plaintiff to recover on it pursuant to UCC § 3-307(2). Conran v. Yager, 263 S.C. 417, 211 S.E.2d 228 (1975).

Plaintiff, in action on two promissory notes, was entitled to summary judgment where execution and delivery of notes was conceded and where answer did not specifically deny signatures; under such circumstances, signatures were admitted and holder of note was entitled to recover on them unless defendant established defense. Center Bank v. Mid-Continent Meats, Inc., 194 Neb. 665, 234 N.W.2d 902 (1975).

Production of note signed by defendant with his name only, neither naming party or parties for whom he was allegedly trustee nor showing that he signed in representative capacity, established plaintiff's prima facie right to recover thereon. Jolly v. Egerton, 132 Ga. App. 243, 207 S.E.2d 634 (1974).

In action on promissory note bank met its burden of proof under Code § 3-307(b) by establishing that bank was holder of note on which it sued, that defendant had signed note, that note became due and payable, and that defendant had not paid or offered to pay anything on note. Hensley v. City Bank & Trust Co., 495 S.W.2d 282 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Sept. 19, 1973).

Where plaintiff had established prima facie case in action on demand note by producing note and proving signatures, summary judgment for plaintiff was proper where defendant failed to present facts in support of alleged defenses of lack of consideration, failure of consideration, and lack of delivery. Loew v. Minasian, 361 Mass. 390, 280 N.E.2d 688 (1972).

In action on check delivered by defendant to plaintiff but not paid when presented for payment, plaintiff's introduction in evidence of check, signed by defendant as maker and held by plaintiff, established prima facie case for plaintiff. Helman v. Dixon, 71 Misc. 2d 1057 (1972).

Where note was admitted into evidence establishing a prima facie case as to the signature and the authorization therefor, and where no defense was offered, production of the note entitled defendant to recover thereon and a directed verdict on the counterclaim was demanded. Q.S. King Co. v. Minter, 124 Ga. App. 517, 184 S.E.2d 594 (1971).

When the check on which payment has been stopped is introduced in evidence in the action against the drawer and the drawer's signature is not disputed, a prima facie case is made out that the plaintiff is a holder in due course and the drawer has the burden of establishing any defense. Jaeger & Branch, Inc. v. Pappas, 20 Utah 2d 100, 433 P.2d 605 (1967).

In an action by a holder upon a negotiable note against the maker in the Superior Court, where findings in favor of the holder in the District Court made out a prima facie case in favor of the holder under c 231, § 102C, the burden was on the maker, notwithstanding the provisions of subsec (3) of the instant section, to rebut the holder's prima facie case. Universal C.I.T. Credit Corp. v. Ingel, 347 Mass. 119, 196 N.E.2d 847 (1964).

17. Proof of defenses; in general.

In suit on promissory note for balance due on purchase of insurance, after signature on note had been admitted by defendants, they had under UCC § 3-307(2) burden of establishing any affirmative defense that they might have had to plaintiff's action, and trial did not err in awarding summary judgment against defendants on their failure to rebut prima facie case created against them by their admission of execution of note. Orr v. Woodruff-Robinson, Inc., 142 Ga. App. 861, 237 S.E.2d 463 (1977).

Where defenses are raised against note, burden under UCC § 3-307 is on plaintiff to show that he is holder in due course in order to effectively cut off such defenses. If plaintiff fails to sustain his burden, his action is subject under UCC § 3-306(b) to all defenses that would be available on simple contract, as long as such defenses are in some way connected with debt sued on or transaction under which it arose. Seamans v. Miller, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

Under UCC § 3-307(2), where execution of note and mortgage was established by evidence of notary who drew them, burden of establishing defense was on defendant makers. Adair v. Adair, 192 Neb. 571, 222 N.W.2d 908 (1974).

Where the instruments were produced and the signatures admitted, UCC § 3-307 placed the burden upon defendant to prove its defenses. Arkansas Real Estate Co. v. Heeb, 251 Ark. 113, 471 S.W.2d 327 (1971).

The burden of proof is upon the defendant to establish a defense once the validity of his signature is established or admitted. Gate City Furn. Co. v. Rumsey, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

In a suit upon a promissory note, when the maker by answer admits the execution of the note and pleads an affirmative defense as to the holder's right of recovery, the burden rests upon the maker to establish the allegations of his answer by preponderance or the evidence. Persson v. McCormick, 412 P.2d 619 (Okla. 1966).

Where, in a suit on a promissory note, the defendant, having admitted signing the instrument, offered no evidence either to establish a defense to the holder's right of recovery, or that the holder was not a holder in due course, the question as to whether holder was a holder in due course would not arise until the maker established a defense. Persson v. McCormick, 412 P.2d 619 (Okla. 1966).

18. —Fraud of misrepresentation.

Although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer from Pakistani seller, constituted "fraud in the transaction" within meaning of UCC § 5-114(2), Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114(2), i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

Plaintiff was entitled to recovery upon presentation of note, showing of present ownership and holding of note, and establishment of defendant's signature thereto, defendant having raised defenses of fraud and/or illegality, which must be raised affirmatively and could not, as here, be raised in affidavit opposing motion for summary judgment. Anderson v. Industrial State Bank, 478 S.W.2d 215 (Tex. Civ. App. 1972), writ ref'd n.r.e., (June 14, 1972).

Where testimony of two witnesses was in conflict as to completion of note at time of execution, plaintiff-payee was entitled to judgment, since burden was on defendant-maker to establish defense of unauthorized completion by preponderance of total evidence. Newby v. Armour Agr. Chem. Co., 119 Ga. App. 650, 168 S.E.2d 652 (1969).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

19. —Want or failure of consideration.

Where guarantor in action on written personal guaranty of loan failed to prove, as affirmative defenses, either failure of consideration or breach by lender of loan agreement by not lending borrower additional funds under such agreement, with allegedly resultant injuries to borrower, lender on production of guaranty instrument was entitled under UCC § 3-307(2) to recover thereon for sums actually loaned to borrower. Crider v. First Nat'l Bank, 144 Ga. App. 536, 241 S.E.2d 638 (1978).

Promissory note executed by shareholder to partially satisfy overdraft of corporation was supported by consideration under UCC §§ 3-307(2) and 3-408 despite contentions that note was signed at request of bank to protect it from bank examiners and until another loan could be obtained from Small Business Administration. Farmer v. Peoples Am. Bank, 132 Ga. App. 751, 209 S.E.2d 80 (1974).

Introduction of note in evidence established prima facie case against maker for face value of note, and burden of proof was on defendant maker to establish defense of lack of consideration. Darden v. Harrison, 495 S.W.2d 49 (Tex. Civ. App. 1973), rev'd, 17 Tex. Sup. Ct. J. 357, 511 S.W.2d 925 (Tex. 1974).

Once want of consideration is pleaded, there is still presumption that note is valid, and defendant has burden of proving his plea, so that where even evidence of defendant established that assignment of note was part of consideration for execution and delivery of second note, proof of total want of consideration was lacking. Parker v. McGaha, 291 Ala. 339, 280 So. 2d 769 (1973).

The burden of proving a defense of no consideration in a suit brought by the payee of a check returned to him by the drawee bank for insufficient funds rests on the drawer. Buehrer v. Gates, 411 S.W.2d 676 (Ky. 1967).

Where execution and default in performance are established, mere possession and production into evidence of note and trust deed entitles holder to prima facie basis for recovery thereon, with burden of preponderating on defense of failure of consideration shifted to nonholder. Rago v. Cosmopolitan Nat'l Bank, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

Payment is defense which must be affirmatively established by maker or payee, once instrument is produced by holder; burden of pleading and proving such defense cannot be sustained by filing of general denial. Harrison v. Morias, 141 Ind. App. 537, 230 N.E.2d 545 (1967).

Where the maker of a trade acceptance asserted the defense of no consideration in his answer, the burden was on the purchaser of the instrument to prove that it was a holder in due course. Credit Indus. Corp. v. DiNanno, 29 Mass. App. Dec. 40 (1964).

After having proved the execution and delivery of certain promissory notes by a decedent, claimants seeking recovery on the notes against the decedent's estate did not have to prove consideration, because the burden was then on the estate to prove a lack of consideration. However, when the claimants, after presenting their notes, went further and introduced testimony in anticipation of the defense of failure of consideration, they relieved the estate of the burden of proving lack or failure of consideration. In re Calanno Estate, 14 Pa. D. & C.2d 153, 8 Fiduc. Rep. 180 (1958).

Under Pennsylvania law the holder of a promissory note under seal, the execution of which by a decedent is proved, is entitled to recover under subdivision (2) of this section, and the defense of want of consideration is unavailable in an action on a sealed instrument. In re Chadwick's Estate, 44 Wash. C. R. 182 (1964).

20. —Miscellaneous defenses.

Asserted unawareness of nature and effect of signature is not defense against holder of instrument when signature is admitted or established. Prudential Ins. Co. of Am. v. Bonney, 299 F. Supp. 790 (W.D. Okla. 1969).

Where maker of note testified that he left blank note containing only his signature but no amount and no date with president of bank and said note was filled in and completed without authorization, burden shifted to payee to establish that it was holder in due course under UCC § 3-307. Sea Hoss Marine Enters., Inc. v. Angleton Bank of Commerce, 536 S.W.2d

592 (Tex. Civ. App. 1976), ref. n.r.e (Sept. 29, 1976).

As a holder within the meaning of UCC § 1-201, subd 20, an escrow agent established a prima facie case on maker's dishonored check under UCC § 3-307 subd 2, and it was no defense either that escrow agent could not himself sue on the check, or that the principal had failed to perform under escrow agreement, where escrow agent had acknowledged receipt of cash, and could sue on check under CPLR § 1004 either as trustee of principal, or as promisee of a third party beneficiary contract, and where maker prevented principal's performance. Helman v. Dixon, 71 Misc. 2d 1057 (1972).

Defense pleaded by a defendant, consisting of a denial of delivery and a denial that the plaintiff was a holder in due course, was sufficient to place the burden of proof on the plaintiff. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

21. Due course as holder's defense.

Just as where a person who establishes holder in due course status is entitled to take free of personal defenses such as fraud, so too can a holder in due course who has already been paid assert his status as a defense under UCC § 3-307 in an action by the drawer to recover back the payment. Nida v. Michael, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

22. —Burden of proving due course.

Where maker of promissory note raised defense of fraud in the inducement, holder had burden of showing that it was holder in due course, but, having satisfied such burden, it was not subject to such defense. Federal Nat'l Mtg. Ass'n v. Gregory, 426 F. Supp. 282 (E.D. Wis. 1977).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also counterclaimed for damages for such fraud). Kreutz v. Wolff, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Where party who executed promissory note to bank, which indorsed it to holder for valuable consideration, did not deny execution of note or allege any affirmative defense to holder's suit to recover on note, which was past due and payable, holder could recover under UCC § 3-307(2) without having to prove that it was holder in due course. Little v. Business Data Ctr., Inc., 550 S.W.2d 406 (Tex. Civ. App. 1977).

Where note showed on its face that it was due on date on which it was made and that it provided for rate of interest illegal at that time, plaintiff to whom note had been negotiated failed to sustain burden of proof under UCC § 3-307 that he was holder in due course, and trial court did not err in considering defense that since defendant maker had assumed, under contract pursuant to which note was given, greater obligation than he had contracted for, he could offset such amount in action on note. Seamans v. Miller, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

It is only after it is shown that a defense exists that one claiming the rights of a holder in due course has the burden of establishing that fact. Aetna Cas. & Sur. Co. v. Watson, 476 S.W.2d 868 (Tex. Civ. App. 1972).

Evidence indicating possibility of defense is sufficient under UCC § 3-307(2) to place burden on plaintiff of proving himself to be holder in due course, a burden that is satisfied if the trier of fact is persuaded that the existence of the holder in due course elements as defined by UCC § 3-302 is more probable than their nonexistence. Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d 1331 (Okla. 1971).

Just as where a person who establishes holder in due course status is entitled to take free of personal defenses such as fraud, so too can a holder in due course who has already been paid assert his status as a defense under UCC § 3-307 in an action by the drawer to recover back the payment. Nida v. Michael, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

Person claiming to be holder in due course has affirmative burden of proving that instrument was taken for value in good faith and without notice. Brown v. Kelley, 120 Ga. App. 788, 172 S.E.2d 181 (1969).

Once the defendant establishes that he has some kind of defense, the burden is on the holder to establish that he is a holder in due course. Daric Constr. Corp. v. Radice Constr. Corp., 4 U.C.C. Rep. Serv. 763 (1967, NY Sup).

Where the maker of the notes sued on proved that they were given as part of an agreement under which he was to receive a franchise for the sale of certain merchandise, and that none of the merchandise was ever delivered by the payee, the holder of the notes had the burden of proving that he took the notes for value, and without notice of any infirmity. Pugatch v. David's Jewelers, 53 Misc. 2d 327 (1967).

Even if defenses are established so as to overcome right of holder to recover on instrument under Code § 3-307(2), holder should be accorded opportunity of successfully overcoming any defense raised. Gate City Furn. Co. v. Rumsey, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

Where defenses such as payment or that the paper is overdue are asserted by the maker of a note, the burden is upon the party claiming the rights of a holder in due course to prove his status as such. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

One claiming to be the holder of a check in good faith and without knowledge of any defense to its acceptance and payment has the burden of proving it. Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

To overcome a defense of defective workmanship in the article purchased which constituted consideration for the execution of the promissory notes sued on, the holder is under the burden of proving that it is a holder in due course, and where that burden is not met it cannot recover. United Sec. Corp. v. Bruton, 213 A.2d 892 (D.C. 1965).

The provision in subdivision (3) of this section that the holder of a promissory note has the burden of establishing that it is a holder in due course where a defense exists is procedural and not substantive in effect, and it applies to an action brought after the section became effective, although the entire transaction was concluded prior to its effective date. United Sec. Corp. v. Bruton, 213 A.2d 892 (D.C. 1965).

Under subsection (3) of the instant section where indorsees sue upon instruments, and a defense of fraud in the procuring of the instruments is established, the burden is on the plaintiffs to show that they are holders in due course. Korzenik v. Supreme Radio, Inc., 347 Mass. 309, 197 N.E.2d 702 (1964).

The burden of showing that he is a holder in due course is on the one claiming to be such where the defense of fraud appears to be meritorious as to the payee. Norman v. World Wide Distribs., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963).

Where it appeared that a note was obtained by fraud, one seeking to recover on the note as a holder in due course had the burden of showing that it was a holder in due course. Budget Charge Accounts, Inc. v. Mullaney, 187 Pa. Super. 190, 144 A.2d 438 (1958).

Testimony by the makers of a note, that it was fraudulently executed and used for a purpose not intended, placed the burden on the holder to show that it was a holder in due course, or that some person under whom it claimed was in all respects a holder in due course. First Pa. Banking & Trust Co. v. De Lise, 186 Pa. Super. 398, 142 A.2d 401 (1958).

The holder of a note who introduced no testimony as to the time or circumstances under which it was negotiated did not sustain the burden of showing itself to be a holder in due course; on the other hand, if it had introduced evidence that it received the note for value before maturity and without notice of any claim or defense, a refusal to open a judgment by confession on the note would have been warranted. First Pa. Banking & Trust Co. v. De Lise, 186 Pa. Super. 398, 142 A.2d 401 (1958).

The holder meets the burden of establishing that he is a holder in due course when a petition is filed to open the judgment which he has entered on the instrument and (1) the defendant's own evidence shows that the holder did not have notice of the defect until months after he acquired the instrument, and (2) the defendant, by failing to file a replication, admitted the holder's averments of facts which if true would make the holder a holder in due course. Bachman & Co. v. Brubaker, 56 Lanc. L. Rev. 289 (Pa. 1959).

23. —Failure to show due course.

In action to recover on check issued by defendant and made payable to named corporation, where plaintiff's testimony showed that sole owner of payee corporation had indorsed check in blank and delivered it to plaintiff in payment for personal debt and that defendant had dishonored check by stopping payment thereon, and where defendant testified that payment was stopped at request of payee because check had been stolen from payee's mail and had been fraudulently indorsed, under UCC § 3-307(2) plaintiff's failure to place check in evidence or satisfactorily explain its absence, together with defendant's establishment of good defense, prevented plaintiff from recovering as holder of such check, even though signatures thereon were established by plaintiff. McKirgan v. American Hosp. Supply Corp., 37 Md. App. 85, 375 A.2d 591 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned note to bank but failed to deliver equipment, bank was not holder in due course under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. Kaw Valley State Bank & Trust Co. v. Riddle, 219 Kan. 550, 549 P.2d 927 (1976).

Where bank accepted check from its depositor, forwarded it for collection, drawer stopped payment on check and, during interval between deposit of check and notice of stop payment order, bank granted credit and made payment upon checks drawn by its customer, bank was holder in due course to extent of advances made to its depositor; fact that standard banking practice would have been to withhold payment on check until it had been collected was not sufficient to establish that bank did not exercise good faith in handling check. St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co., 302 Minn. 71, 224 N.W.2d 746 (1974).

In action by corporate assignee to recover on promissory note, assignee failed to establish that it was holder in due course under UCC § 3-307(3) where assignee claimed only an assignment of unspecified date and did not even allege that it was holder in due course, and where note recited on its face that it was "taken for insurance." College Park Credit Corp. v. Carver, 132 Vt. 524, 322 A.2d 305 (1974).

Purchaser of note had burden of proving holder in due course status, but could not qualify for such status where fact that note was executed in violation of District of Columbia Loan Shark Act was apparent on face of instrument. In re Parkwood, Inc., 461 F.2d 158, 149 U.S. App. D.C. 67 (1971).

Assignee of conditional sales contract and note could not recover "finance charge" or "carrying charge" exceeding 8% per year, where assignee had established neither that he was holder in due course nor that transaction was usurious. Fuller v. Universal Acceptance Corp., 264 A.2d 506 (D.C. 1970).

To show he is a holder in due course, the holder of an instrument satisfies his burden with respect to good faith by testifying that he took the instrument in complete innocence and by disclosing the circumstances of the transfer, and where circumstances revealed plaintiff had actual knowledge of legal deficiencies in the transaction, he was not a holder in due course and consequently took the note subject to defenses raised under provisions of the Secondary Mortgage Loan Act. HIMC Inv. Co. v. Siciliano, 103 N.J. Super. 27, 246 A.2d 502 (1968).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

24. Practice and procedure.

Where lender brought action to recover money evidenced by promissory notes purportedly signed by husband, wife, and daughter, denial by all three defendants that signature on note was daughter's constituted sufficient evidence to rebut presumption that signatures were genuine or authorized pursuant to UCC § 3-307(1). McCusker v. Fascione, 117 R.I. 478, 368 A.2d 1220 (1977).

In action to enforce guarantor's liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, inter alia, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be defendant's signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys' fees. Wolfe v. Madison Nat'l Bank, 30 Md. App. 525, 352 A.2d 914 (1976).

Under UCC § 3-307(1), where purported maker of note denied signature but introduced no evidence to support defense that signature was forged or unauthorized, presumption of validity of signature was not rebutted, and expert testimony is not required to support claim as trial judge, sitting as trier of fact, is entitled to make his own comparison of signatures and form his own opinion as to authenticity. Jax v. Jax, 73 Wis. 2d 572, 243 N.W.2d 831 (1976).

In action on promissory note, where maker of note admitted his signature but asserted defense of lack of consideration, trial court erred in instructing jury where instructions failed to properly identify issue being tried, i. e., lack of consideration, did not properly inform jury that defendant maker had burden of proving lack of consideration, and did not define consideration. Villegas v. Bagwell, 529 P.2d 1011 (Okla. Ct. App. 1974).

The elements constituting a holder in due course are questions of fact for the triers of fact to determine. Northside Bank v. Investors Acceptance Corp., 278 F. Supp. 191 (W.D. Pa. 1968).

25. —Failure to state claim for relief.

Although UCC § 3-307(2) is concerned with evidentiary burdens of proof, it is also determinative of sufficiency of allegations required to state claim for relief in action to recover on negotiable instrument, and, consistent with this statutory provision, assignee of negotiable instrument suing thereon need not plead specific facts from which his assignor derived status of holder in due course. Thus, in action to recover on check, allegations by plaintiff-assignee to effect that her assignor was holder in due course and that instrument had been regularly transferred to her by assignment, were sufficient as to holder status and as to transfer, and complaint sufficiently set forth claim for relief. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974).

Defendants seeking to reopen judgment by confession on promissory note signed by them failed to allege sufficient facts to clearly show that they had defense to note based on lack of consideration under UCC § 3-307(2) where defendants were heirs of owner of automobile dealership who was indebted to plaintiff on prior promissory note, where defendants were actively managing automobile dealership after owner's death, and where defendants had paid interest owing on prior note up through date of renewal note they executed; under UCC § 3-408, note signed as security for antecedent claim or debt, even though signed by third party, needs no consideration, and defendants failed to demonstrate that note signed by them was not given as security for antecedent debt of deceased owner. First Nat'l Bank v. Achilli, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

26. —Summary judgment.

In action by equipment rental company in South Carolina court to enforce default judgment rendered against defendants in New York court for amount owed under equipment lease that was secured by defendants' written "guarantee of payment," where such guarantee provided for consensual personal jurisdiction in New York courts in all actions or proceedings based on guarantee, and where answer of one defendant in South Carolina action did not deny genuineness of her signature on guarantee which was sole foundation for New York judgment, production of guarantee, New York judgment thereon, and absence of any assertable defense to guarantee's validity (such as forgery thereon of defendant's signature) entitled plaintiff under UCC § 3-307, as matter of law, to summary judgment in South Carolina action. National Equip., Ltd. v. David Jones Sales, Trucking Div., Inc., 268 S.C. 551, 235 S.E.2d 125 (1977).

Under UCC § 3-307(2), where defendant admitted genuineness of his signature on note and defenses raised in defendant's answer were not supported by the evidence, which was uncontroverted, trial court did not err in granting summary judgment as to principal amount of note and accrued interest thereon. However, since plaintiff offered no evidence on his motion for summary judgment that provisions in note concerning attorney's fees had been complied with, trial court erred in granting summary judgment as to such fees. Bowman v. McDonough Realty Co., 143 Ga. App. 128, 237 S.E.2d 647 (1977).

In action by two makers and all but one coguarantor on promissory note against remaining guarantor for entire amount of unpaid principal balance due, where plaintiffs relied for recovery on UCC § 3-307(2) dealing with effect of admission of signatures on instrument, but complaint showed on its face that persons primarily liable on instrument were seeking to recover from one who was only secondarily liable thereon and plaintiffs did not explain in their pleadings how such liability could arise, trial court committed error in granting judgment on pleadings for plaintiffs. Auerback v. Maslia, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

Where maker of note executed in conjunction with conditional sales contract for purchase of airplane stated in affidavit in response to motion for summary judgment that he believed crash of airplane had resulted from defective manufacture of plane, this was strictly speculation and opinion of maker and as such did not raise fact issue on affirmative defense against holder in due course under UCC § 3-307. Whittenburg v. Cessna Fin. Corp., 536 S.W.2d 444 (Tex. Civ. App. 1976), ref. n.r.e (Oct. 6, 1976).

Debtor who claimed to have signed promissory note as representative of corporation and not individually was personally liable under UCC §§ 3-307(b) and 3-403(b)(2) where instrument itself did not indicate that debtor was signing in representative capacity and where assertion that he intended to sign, and did sign, in representative capacity was insufficient to raise issue of fact to "otherwise establish" his representative capacity. Seale v. Nichols, 505 S.W.2d 251 (Tex. 1974).

In action by holder of two promissory notes to recover against corporate maker, trial court properly granted summary judgment for holder where corporation did not specifically plead lack of authority of corporate officer to make instrument either in counter-affidavit or in its pleading. Universal Printing Co. v. Sayre & Fisher Co., 501 S.W.2d 180 (Mo. Ct. App. 1973).

The trial court did not err in granting the plaintiff's motion for summary judgment in an action on two promissory notes where the defendant admitted execution but failed to establish an affirmative defense. Freezamatic Corp. v. Brigadier Indus. Corp., 125 Ga. App. 767, 189 S.E.2d 108 (1972).

Action to recover on promissory note; held, defendant's general denial raised substantial fact issue as to ownership of note precluding summary judgment. Blair v. Halliburton Co., 456 S.W.2d 414 (Tex. Civ. App. 1970).

A trial was required and plaintiff should be required to file a reply where the defendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

27. —Damages.

The production of the promissory note sued on entitled the holder to recover unless a defense is established, and the term "recover on it" appearing in subdivision (2) of this section makes it quite clear that the holder is entitled to the full amount sued for, without proof of the amount or of nonpayment, unless the defendant pleads and proves some defense thereto. Persson v. McCormick, 412 P.2d 619 (Okla. 1966).

III. DECISIONS UNDER FORMER STATUTES.

28. In general.

Whether or not one is a holder in due course does not depend upon his diligence or negligence. Securities Inv. Co. v. Cohen, 241 Miss. 549, 131 So. 2d 439 (1961).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note given for the purchase of farm equipment, at the time it was indorsed to the bank, a purchase order signed by the maker-purchaser in favor of the seller-payee on the reverse side of which there was a "warranty and agreement" did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. Misso v. National Bank of Commerce, 231 Miss. 249, 95 So. 2d 124 (1957).

Every holder is deemed prima facie to be a holder in due course subject to limitation that if negotiator's title was defective, the holder must prove that he, or his predecessor in title, acquired the title as holder in due course. Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." Moore v. Vaughn, 167 Miss. 758, 150 So. 372 (1933).

Where title of one negotiating note was defective, holders had burden of proving they were holders in due course. Cassedy v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

Partners seeking to probate note against estate where title of one negotiating it was defective held not to have met burden showing they were holders in due course. Cassedy v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

RESEARCH REFERENCES

ALR. Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 42-47.

CJS. 10 C.J.S., Bills and Notes § 27-29, 80.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if:

(1) The person seeking to enforce the instrument:

(i) Was entitled to enforce the instrument when loss of possession occurred; or

(ii) Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(2) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Section 75-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

SOURCES: Laws, 1992, ch. 420, § 35; Laws, 2010, ch. 506, § 18, eff from and after July 1, 2010.

Cross References — Entitlement of claimant, who has right to assert claim under subsection (b) of § 75-3-312 and who is further entitled to enforce lost, stolen, or destroyed cashier's, teller's, or certified check, to assert rights with respect to the check, see § 75-3-312.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-804.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-804.

11. In general.

UCC § 3-804 permits the owner of lost commercial paper to maintain an action thereon in his own name and recover from any party liable on the instrument on due proof of ownership, the facts that prevent his production of the instrument, and the instrument's terms. The degree of proof required of the plaintiff in such an action is a mere preponderance of the evidence and not clear and convincing evidence. HFC v. Johnson, 56 Ohio App. 2d 14, 381 N.E.2d 215 (1978).

The court may not order payment on a lost negotiable instrument without requiring the payee to post security as required by section 3-804 of the Uniform Commercial Code, since the furnishing of such security is mandatory and not discretionary. Thus, where petitioner payee lost, misplaced or was criminally relieved of two certified checks drawn on respondent bank, which refused to honor replacement checks unless an indemnity bond was posted in twice the amount of the original checks as required by section 3-804, the court despite the onerous and unjust burden thereby imposed has no authority to grant petitioner's application for recovery of the amount of the checks from the bank without the posting of such security. Diaz v. Manufacturers Hanover Trust Co., 92 Misc. 2d 802 (1977).

Under New York version of UCC § 3-804, court may not order payment to be made on lost negotiable instrument without requiring payee of such instrument to post security in amount not less than twice the amount allegedly unpaid on the instrument. Diaz v. Manufacturers Hanover Trust Co., 92 Misc. 2d 802 (1977).

In action by bank to recover funds credited to defendant's checking account plus cash paid to defendant following defendant's deposit of check which was subsequently dishonored, although bank lost check, it was entitled to maintain action where it presented photostatic copy of original instrument at trial. Laurel Bank & Trust Co. v. Sahadi, 32 Conn. Supp. 172, 345 A.2d 53 (1975).

In an action by a Massachusetts collecting bank against a Puerto Rican firm with offices in New York, which had bought yarn from an Italian corporation, and its New York guarantor, to recover the amount credited to the depository bank in Italy upon receipt of a check drawn on a Tennessee bank, which check was lost after the collecting bank had taken steps to present the check for payment to the Tennessee bank, it was held that since the Puerto Rican firm because of the nonpayment of the check never discharged its obligation under its contract of sale with the Italian firm, the Italian firm had cause of action against the Puerto Rican firm and its guarantor, which cause of action was assignable to the collecting bank. National Shawmut Bank v. International Yarn Corp., 322 F. Supp. 116 (S.D.N.Y. 1970).

UCC § 3-804 provision that security "shall" be required is not mandatory and payee of stolen certified check could recover upon furnishing less than security required to protect bank where it seemed almost certain that checks would never be presented or honored. 487 Clinton Ave. Corp. v. Chase Manhattan Bank, 63 Misc. 2d 715 (1970).

Where assignee did not have possession of check at time of commencement of action, it could not maintain action against drawer even though, after commencement of action, payee gave depositary bank the check and, prior to commencement of action, payee had assigned partial interest in proceeds of check to depositary bank. Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp., 255 Or. 192, 465 P.2d 868 (1970).

For an indorsee to recover from his indorser upon dishonored checks there must be clear and convincing proof of their ownership, and in the absence of possession, ownership would usually depend upon proof that the indorsee did not voluntarily surrender possession unless he did so conditioned upon payment of the checks, and surrender of the checks to the indorser, without payment, and without even a demand for payment, tells against the retention of ownership and indicates an intention not to hold the indorsees liable on the instruments. Dluge v. Robinson, 204 Pa. Super. 404, 204 A.2d 279 (1964).

RESEARCH REFERENCES

ALR. Rights of one who acquires lost or stolen traveler's checks. 42 A.L.R.3d 846.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 279, 280, 303, 311, 359.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:201, 3:202 (complaint, petition, or declaration — for recovery on lost promissory notes).

12A Am. Jur. Legal Forms 2d, Lost and Destroyed Instruments, §§ 169:14, 169:15 (affidavit of loss — written instrument — negotiable instrument).

19A Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2152 (commercial paper: lost, destroyed, or stolen instruments).

§ 75-3-310. Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) is taken for an obligation, the effect is (i) that stated in subsection (a) if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) in any other case.

SOURCES: Laws, 1992, ch. 420, § 36, eff from and after January 1, 1993.

Cross References — Payment by check as conditional and defeated as between parties by dishonor of check on due presentment, subject to provisions of this section, see § 75-2-511.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-802.

11. In general.
12. Applicability to various obligations.
13. "Taken" instrument.
14. Pro tanto discharge.
15. Suspension of obligation.
16. Election of remedy upon dishonor.
17. Discharge from instrument and obligation.
18. Practice and procedure.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-802.

11. In general.

Under UCC § 3-802(1), when an obligee takes a negotiable instrument drawn or made to his order and on which there is no recourse against the obligor, the obligor is discharged from paying the underlying payment obligation. In all other situations, in the absence of a contrary agreement, when an obligee takes a negotiable instrument that is tendered in payment of a promise to pay money, the obligor is not discharged on the underlying promise of payment until the second instrument itself is paid. When the second instrument is due, the first instrument is revived, and failure to pay the second instrument gives rise to a cause of action on either instrument. First Pa. Bank v. Triester, 251 Pa. Super. 372, 380 A.2d 826 (1977).

12. Applicability to various obligations.

The acceptance of promissory notes by a lessor from a lessee and one of two guarantors as conditional payment for an underlying debt obligation in the form of leases operated to suspend the obligation of the second guarantor under a Continuing Guaranty until such time as the notes became due and unpaid. Woods-Tucker Leasing Corp. v. Kellum, 641 F.2d 210 (5th Cir. 1981).

UCC § 3-802(1)(b) applies to the taking of a third person's negotiable note for an existing debt. (where two notes of corporation were taken and applied to individual debt of officer of such corporation). McDowell v. Miller, 557 S.W.2d 266 (Mo. Ct. App. 1977).

13. "Taken" instrument.

Although giving of check is conditional payment and, under UCC § 3-802 (1) (b), where an instrument is "taken for an underlying obligation...the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment," mailing of ordinary corporate check in Kansas City on February 28 did not constitute payment of promissory note in New York City on March 1 where check did not arrive until March 5 and payee did not accept check, but rejected it at first opportunity. Stream v. CBK Agronomics, Inc., 79 Misc. 2d 607 (1974), modified, 48 A.D.2d 637, 368 N.Y.S.2d 20 (1 Dep't 1975).

14. Pro tanto discharge.

Fact that loan servicing agent of mortgagee accepted check drawn on title company, payment of which was later stopped, as payment for three instalments due on mortgage loan, did not operate to satisfy or discharge mortgagor's underlying obligation: (1) Obligation was merely suspended pending collection or rejection of instrument pursuant to UCC § 3-802(1)(b) and testimony by officer of loan serving agent that agent as matter of practice accepted checks of title companies was not sufficient to raise question of fact as to whether there was any agreement to accept check as satisfaction of underlying obligation; (2) Furthermore, underlying obligation was not pro tanto discharged upon acceptance of check pursuant to UCC § 3-802(1)(a) since there was no showing that title company was in business of receiving deposits subject to demand payments, or that it held itself out as bank. Congress Indus., Inc. v. Federal Life Ins. Co. (Mut.), 114 Ariz. 361, 560 P.2d 1268 (Ct. App. 1977).

Where party to litigation admitted owing to opposing party specified sum of money which was paid into registry of court by certified check, but lapse of nine days occurred before check was deposited by court clerk in court's registry account, opponent was not entitled to interest on amount of check during nine-day period; although first party, as drawer, was not discharged until certified check was paid, nevertheless, check was negotiated by delivery to clerk, the named payee, and this had effect of suspending underlying obligation of party, pro tanto, until instrument was presented for payment, and, thus, interest claimed by other party would be owing only if check had been dishonored when presented for payment. Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F. Supp. 1362 (N.D. Miss. 1975).

Where customer of stockbroker caused bank to issue teller's check payable to stockbroker's order in payment of customer's debt and check was mailed to stockbroker's office but was wrongfully appropriated by employee who erased stockbroker's name, substituted his own and collected amount of check from drawee, underlying obligation was discharged under UCC § 3-802(1)(a), and bank, as drawer, had no further responsibility on the instrument. Abraham & Co. v. Dollar Sav. Bank, 48 A.D.2d 807 (1st Dep't 1975), appeal dismissed in part, denied in part, 38 N.Y.2d 795, 381 N.Y.S.2d 870, 345 N.E.2d 342 (1975).

Teller's check, delivered as equivalent of cash, was bank's own direct and primary obligation to plaintiff, and it could not resist enforcement of its contract in order to make setoff or counterclaim available to its depositor who had used check as payment for automobile. Manhattan Imported Cars, Inc. v. Dime Sav. Bank, 70 Misc. 2d 889 (1972).

Under the provision of subd 1(a) of this section where bank draws teller's check on another bank payable to third person, the underlying obligation for which the check is given is discharged even though the issuing bank stops payments on the check. Malphrus v. Home Sav. Bank, 44 Misc. 2d 705 (1965).

15. Suspension of obligation.

Where defendant along with another comaker signed original 90-day promissory note on February 14, 1974 and also 60-day renewal note for same amount on May 15, 1974, and where, in bank's suit on original note after comakers' default on both notes, defendant contended that he was not liable because renewal note that he gave bank had discharged original note, (1) because defendant signed renewal note, bank had recourse against him on renewal note as underlying obligor and defendant was therefore not discharged under UCC § 3-802(1)(a); (2) under UCC § 3-802(1)(b), obligation underlying renewal note was promise to pay original note (on which bank brought suit); and (3) in absence of contrary agreement, as to which defendant offered no evidence, renewal note merely suspended, and did not discharge, defendant's underlying obligation (original note) until renewal note became due (holding that liability on original note had not been discharged by payment or satisfaction). First Pa. Bank v. Triester, 251 Pa. Super. 372, 380 A.2d 826 (1977).

Where guarantor of sales contract signed promissory note to pay balance after default by buyer, execution of note was not payment, but without express agreement to the contrary, obligation was merely suspended, rather than discharged pursuant to UCC § 3-802(1)(b). Knight v. Cheek, 369 A.2d 601 (D.C. 1977).

Even though check was conditional payment, it was sufficient to satisfy provision of divorce decree requiring husband to pay wife one-half of appraised value of certain property since, if check was dishonored, debt still remained. Kelley v. Kelley, 53 Ala. App. 608, 303 So. 2d 108 (Civ. App. 1974).

When an indorser makes payment by check his liability is merely suspended as provided by UCC Sec 3-802. Makel Textiles, Inc. v. Dolly Originals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

The defendant's indebtedness to the plaintiff for services performed was not discharged by delivery of the promissory note of a third party indorsed by the defendant "without recourse", and defendant's obligation was merely suspended until the instrument became due at which time the plaintiff had the election of maintaining an action either on the instrument or on the obligation. Central Stone Co. v. John Ruggiero, Inc., 49 Misc. 2d 622 (1966).

16. Election of remedy upon dishonor.

Where payment of check tendered in discharge of defendant's underlying obligation was refused by bank solely for lack of sufficient funds in defendant's account and not for lack of proper indorsement or presentment, formal presentment of check was entirely excused under UCC § 3-511(3)(b) (holding that tendered check was conditional payment only, and that under UCC § 3-802(1)(b), underlying obligation was revived after check's dishonor). Rains v. Lewis, 20 Wash. App. 117, 579 P.2d 980 (1978).

In breach of contract action in which plaintiffs elected to seek recovery on dishonored check, under UCC § 3-802(1)(b), validity of underlying obligation, insofar as it related to check, was not issue in case. Perry & Greer, Inc. v. Manning, 282 Or. 25, 576 P.2d 791 (1978).

Under UCC § 3-802(1)(b), the holder of a note taken for an underlying contract has a choice of remedies: he can sue on the note itself or on the underlying contract (action on note in which court held that since UCC Article 3 has no statute of limitations, six-year period of limitations applicable to actions on an express or implied obligation applied, instead of four-year statute contained in UCC § 2-725(1)). O'Neill v. Steppat, 270 N.W.2d 375 (S.D. 1978).

Under UCC § 3-802(1)(b), personal check given to extend option agreement to purchase land, which was dishonored on presentment, was merely a conditional payment that served only to extent option provisionally until check's presentment, and on dishonor of check, payment failed and option contract lapsed (where grantor of option, who was not required to negotiate check by depositing it, presented it directly to drawee bank for payment). Merriman v. Sandeen, 267 N.W.2d 714 (Minn. 1978).

In action by two subcontractors against owner of land and company which had leased restaurant that it was building on such land to enforce mechanic's lien claims for unpaid labor and materials employed in restaurant's construction, where evidence showed (1) that defendant lessee's procedure was to make progress payments to main contractor on receipt of labor and materials releases executed by all subcontractors working on project, (2) that plaintiffs had executed such releases to main contractor to cover all claims for labor and materials up through specified date, (3) that defendant lessee had then paid main contractor for all work done on project as of such date, and (4) that main contractor had thereafter paid plaintiffs by checks on which payment was subsequently stopped, plaintiffs could not successfully contend that because taking of seemingly solvent party's check is proper and normal commercial practice under UCC § 2-511(3) and UCC § 3-802, and because under such sections if check is dishonored, payee can either sue on check or on underlying obligation, such sections therefore made plaintiffs' lien claim releases conditional as to defendants, and defendants were not entitled to rely on releases as defense to plaintiffs' claims. In such situation, if releases were intended to be conditional, plaintiffs should have inserted in them language appropriate for such purpose (observing that as against main contractor, plaintiff lien claimants retained rights enumerated by UCC § 3-802). Mountain Stone Co. v. H.W. Hammond Co., 39 Colo. App. 58, 564 P.2d 958 (1977).

Where subcontractor accepted note of third party in satisfaction of obligation of primary contractor, made presentment and demand, but note was dishonored, note did not extinguish contractor's debt to subcontractor and subcontractor's right to sue on underlying obligation was revived upon dishonor of note pursuant to UCC § 3-802. Stone Ft. Nat'l Bank v. Elliott Elec. Supply Co., 548 S.W.2d 441 (Tex. Civ. App. 1977), ref. n.r.e (July 13, 1977).

Issuance of check to auto repairman did not operate as assignment of funds and did not extinguish mechanics lien; underlying obligation was resurrected upon dishonor of draft. Leavitt v. Charles R.

Hearn, Inc., 19 Ill. App. 3d 980, 312 N.E.2d 806 (1st Dist. 1974).

Mailing of ordinary check in payment of estate tax on last day of expiration of fifteen months from date of death did not constitute "payment" of tax on that day to bring assessable interest within rate of four and one half per cent mandated by tax law. In re Nowicki's Estate, 76 Misc. 2d 384 (1973).

Upon breach of airplane hangar construction contract, assignee was not obliged to proceed on promissory note given to cover balance due on contract, but could instead seek damages for breach of underlying contract. Jones v. Bailey, 1 Mass. App. Ct. 41, 294 N.E.2d 599 (1973).

Where defendant delivered his check to plaintiffs as escrow money on purchase of business, and later gave back business and stopped payment on check, plaintiffs were entitled under UCC to bring action on check. Gaskins v. Duke, 483 S.W.2d 499 (Tex. Civ. App. 1972).

Between the original parties to a check payment is conditional, and if the instrument is dishonored, an action may be maintained on either the instrument or the underlying obligation. Mansion Carpets, Inc. v. Marinoff, 24 A.D.2d 947 (1st Dep't 1965).

17. Discharge from instrument and obligation.

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. Chandler Motors, Inc. v. Dunham, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

18. Practice and procedure.

Subcontractor's receipt of contractor's check and execution of release form that accompanied it did not operate as waiver of subcontractor's lien or bar subcontractor from enforcing it where contractor's check was subsequently dishonored. Westland Homes Corp. v. Hall, 193 Neb. 237, 226 N.W.2d 622 (1975).

A subsequent stop-payment order has no bearing on whether or not an enforceable contract came into being upon the delivery and acceptance of the check. Cohn v. Fisher, 118 N.J. Super. 286, 287 A.2d 222 (L. Div. 1972).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 118, 119.

§ 75-3-311. Accord and satisfaction by use of instrument.

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

SOURCES: Laws, 1992, ch. 420, § 37, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 A.L.R.4th 12.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 360.

§ 75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

(a) In this section:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a statement, made in a record under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the ninetieth day following the date of the check, in the case of a cashier's check or teller's check, or the ninetieth day following the date of acceptance, in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to Section 75-4-302(a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or Section 75-3-309.

SOURCES: Laws, 1992, ch. 420, § 38; Laws, 2010, ch. 506, § 19, eff from and after July 1, 2010.

Cross References — Definitions of other terms for purposes of this chapter, see § 75-3-103.

RESEARCH REFERENCES

ALR. Rights of one who acquires lost or stolen traveler's checks. 42 A.L.R.3d 846.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 279, 280, 303, 311, 359.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:201, 3:202 (complaint, petition, or declaration — for recovery on lost promissory notes).

12A Am. Jur. Legal Forms 2d, Lost and Destroyed Instruments, Forms 169:14, 169:15 (affidavit of loss — written instrument — negotiable instrument).

PART 4.

LIABILITY OF PARTIES.

SEC.
75-3-401. Signature.
75-3-402. Signature by representative.
75-3-403. Unauthorized signature.
75-3-404. Impostors; fictitious payees.
75-3-405. Employer's responsibility for fraudulent indorsement by employee.
75-3-406. Negligence contributing to forged signature or alteration of instrument.
75-3-407. Alteration.
75-3-408. Drawee not liable on unaccepted draft.
75-3-409. Acceptance of draft; certified check.
75-3-410. Acceptance varying draft.
75-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.
75-3-412. Obligation of issuer of note or cashier's check.
75-3-413. Obligation of acceptor.
75-3-414. Obligation of drawer.
75-3-415. Obligation of indorser.
75-3-416. Transfer warranties.
75-3-417. Presentment warranties.
75-3-418. Payment or acceptance by mistake.
75-3-419. Instruments signed for accommodation.
75-3-420. Conversion of instrument.

§ 75-3-401. Signature.

(a) A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under Section 75-3-402.

(b) A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

SOURCES: Former § 75-3-401: Codes, 1942, § 41A:3-401; Laws, 1966, ch. 316, § 3-401; Laws, 1992, ch. 420, § 39, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

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III. DECISIONS UNDER FORMER STATUTES.

18. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-401.

11. In general.

Renewal of note by person other than original debtor simply means that original debtor has no personal liability on note as subsequently renewed, but in no way operates to cancel original deed of trust, where subsequent renewals were neither signed nor endorsed by original debtors. Cochran v. Deposit Guar. Nat'l Bank, 509 So. 2d 1045 (Miss. 1987).

Corporation officer who signed corporate note by placing his name on line below typed name of corporation and after typed word "By," and who indicated capacity in which he signed by writing on another line word "President" after typed word "Individually," was relieved from liability under UCC §§ 3-401(1) and 3-403(2)(a), since handwritten word "President" on "Individually" line characterized officer's act as that of official of corporation. Donald M. Clement Contractor v. Demon, Inc., 364 So. 2d 204 (La. App. 1978).

An undisclosed principal is not liable on a negotiable instrument. Instead, under UCC § 3-401(1), the party who signed the instrument is liable thereon (observing, however, that undisclosed principal may still be liable for the debt under equitable doctrine of quasi-contract). Opelika Prod. Credit Ass'n v. Lamb, 361 So. 2d 95 (Ala. 1978).

Where defendant, after stealing driver's license, social security card, and car registration from her landlord's wallet, took such identification to bank, opened checking account in landlord's name, filled out appropriate signature cards, and made small deposit in the account, and where later, when attempting to purchase a television set, defendant used one of the checks obtained from the bank, signed it with landlord's name, and made check out for amount that exceeded defendant's deposit in the account, defendant was not guilty of forgery, since under UCC § 3-401(2), dealing with making of signature on instruments, only defendant would be liable on such check. People v. Hodgins, 85 Mich. App. 62, 270 N.W.2d 527 (1978).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. Marine Midland Bank v. DiMarzo, 57 A.D.2d 733 (4th Dep't 1977).

Any writing to be a negotiable instrument must be signed by the maker or drawer. Jenkins v. Evans, 31 A.D.2d 597 (3d Dep't 1968).

Under § 3-401 of the Uniform Commercial Code, no person is liable on an instrument unless his signature appears thereon and under § 3-306(c), except as to a holder in due course, no person is liable thereon unless there has been a delivery of the instrument, and the same rule with reference to execution and delivery was in effect under the former Illinois Negotiable Instruments Law. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

12. Sufficiency of signature, generally.

In action against issuing bank by holder of money order for face amount thereof, bank was not absolved from liability by UCC § 3-401(1) and (2), dealing with necessity of signature on instrument and use of any word or mark as signature, where money order in suit had bank's name printed on it. Mirabile v. Udoh, 92 Misc. 2d 168 (1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. Marine Midland Bank v. DiMarzo, 57 A.D.2d 733 (4th Dep't 1977).

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were endorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. West Penn Admin., Inc. v. Union Nat'l Bank, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Employee's typewritten and handwritten initials on documents contained in benefit file where employee designations of retirement plan beneficiary were contained, constituted signature of employee under provisions of UCC §§ 1-201(39) and 3-401(2). Mohawk Airlines v. Peach, 81 Misc. 2d 211 (1974), modified, 61 A.D.2d 346, 402 N.Y.S.2d 496 (4th Dep't 1978), appeal denied, 44 N.Y.2d 645 (1978), appeal denied, 44 N.Y.2d 838, 406 N.Y.S.2d 758, 378 N.E.2d 121 (1978).

13. Collateral agreements.

Where defendants purchased real property from sellers who had signed note secured by second deed of trust on property, and where the defendants agreed to assume payment of deed of trust, assignee of note and deed of trust could recover against defendants, notwithstanding their signatures did not appear on note, since defendants were liable, not on the note, but on their contract of assumption. City Mtg. Inv. Club v. Beh, 334 A.2d 183 (D.C. 1975).

Subsection (1) of the instant section cannot be read to mean that no person is liable on a debt whose signature does not appear on a note given as collateral security for that debt. In re Eton Furn. Co., 286 F.2d 93 (3d Cir. Pa. 1961).

14. Corporate undertakings.

Although corporation under UCC § 3-401(1) was not liable on note that it did not sign, it was still liable on underlying obligation for which note was given where separate identity of such corporation and its president and sole shareholder could not be disregarded(where lender of funds for which note was given believed that funds would be used in maker's business). Wiebke v. Richardson & Sons, 83 Wis. 2d 359, 265 N.W.2d 571 (1978).

Where instrument for payment of money was written on personalized check form, individual defendants' names were printed at top of form and their signatures appeared at bottom right-hand corner, where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of $12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. Kaminsky v. Van Dusen, 88 Misc. 2d 833 (1976).

Corporation had sought and been refused bank loan; loan was made for note signed by individual stockholders; stockholders were acting for corporation and proceeds of loan were deposited in corporation's bank account; held, corporation was not liable to bank on note for loan since bank had not secured corporate endorsement on, or guarantee of, note. Potts v. First City Bank, 7 Cal. App. 3d 341 (2d Dist. 1970).

Obligation was solely that of corporation where officers signed notes in representative capacity as clearly set forth in acknowledgment within chattel mortgage. Security Ins. Co. v. Mangan, 250 Md. 241, 242 A.2d 482 (1968).

Where a corporate shareholder did not sign a corporation note as an obligor on the note or as one of the signing officers of the corporation, the dismissal of the complaint in a suit on the note as to that shareholder was proper, since no person is liable on an instrument unless his signature appears thereon. First W. Bank & Trust Co. v. Bookasta, 267 Cal. App. 2d 910 (2d Dist. 1968).

Where corporate name was printed in maker's position on check above two lines for signature of one or more corporate officers, printed corporate name alone was not valid corporate signature. Pollin v. Mindy Mfg. Co., 211 Pa. Super. 87, 236 A.2d 542 (1967).

Notwithstanding that the bankrupt corporation's name did not appear on a note given by its general manager as collateral security for loans made by bank to the general manager, the bankrupt was indebted to the bank where the proceeds of the loan were used for its benefit, and from a course of dealing between the bank and the general manager each understood that when the general manager borrowed money and credited the proceeds to bankrupt's account, the general manager was acting for the account of and in the interest of the bankrupt, his principal. In re Eton Furn. Co., 286 F.2d 93 (3d Cir. Pa. 1961).

Where a note was signed, on successive lines, "John P. Conville," "Doris E. Conville," "Hughesville Mfg. Co., Inc.," and another note was signed, on successive lines, "Hughesville Mfg. Co.," "John P. Conville," "Doris E. Conville," the company was not liable on the notes even though the individuals who signed might have been authorized to sign for it, because the notes did not show that the signatures were made on behalf of the company. Grange Nat'l Bank v. Conville, 8 Pa. D. & C.2d 616 (1957).

15. Joint undertakings.

In action by bank on promissory note executed by husband and wife to evidence loan presently due, bank's claim that son of signers of note, who did not sign it himself, was liable thereon as undisclosed principal because proceeds of loan were used to improve real estate owned by son and his mother could not be sustained under UCC § 3-401(1). In such case, since son's relationship to makers of note and his part ownership of such real estate was known to bank when loan was made, if bank intended him to be liable on note, it should have obtained his signature thereon. Marine Midland Bank v. Anderson, 90 Misc. 2d 909 (1977).

Parties had joined together to build houses on tract of land which they acquired and placed in name of corporation belonging to one member of group; held, each member of group was jointly liable on note executed by corporation owning land. McClung v. Saito, 4 Cal. App. 3d 143 (2d Dist. 1970).

Where one partner executes a note in the name of the firm, other partners are liable thereon although they have not personally signed the note. McCollum v. Steitz, 261 Cal. App. 2d 76 (5th Dist. 1968).

16. Oral agreements.

Political candidate who promised to assume any liability which might be cast upon signers of note if sufficient campaign contributions did not come in to pay note and who received proceeds from note was held accountable on his oral agreement with signers notwithstanding candidate did not sign note and bank made loan only on signatures attached to note and did not look to candidate for its payment. Farmers State Bank v. Conrardy, 215 Kan. 334, 524 P.2d 690 (1974).

17. Practice and procedure.

Suit may not be maintained or judgment obtained on promissory note against undisclosed principal whose signature does not appear thereon; thus, complaint based on promissory note alleging that maker acted as agent of defendants, did not state cause of action against defendants where their names did not appear on note and it was not alleged that note disclosed that agent signed in any capacity other than for himself individually. Ness v. Greater Ariz. Realty, Inc., 21 Ariz. App. 231, 517 P.2d 1278 (1974).

A trial was required and plaintiff should be required to file a reply where the defendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

Although a mere allegation of fraud in a pleading is not sufficient and the party relying on fraud must plead sufficient facts or acts to establish it, where a defendant pleads that he has no knowledge as to how his signature got on the note or as to how the note got in the hands of the plaintiff, it would seem difficult to see how the court could require him to plead facts of which he alleges he has no knowledge. Neboshek v. Berzani, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

Where person signing instrument as agent does so with authority he is not liable thereon but if not duly authorized he is personally liable on such instrument. Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949).

Where guardian signed instrument as agent for partnership consisting of minor ward and mother, minor was not bound, and since partnership of only one person cannot exist, the partnership was nonexistent and as agent for nonexisting principal guardian is liable personally on note. Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949).

§ 75-3-402. Signature by representative.

(a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

(2) Subject to subsection (c), if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

SOURCES: Former § 75-3-402: Codes, 1942, § 41A:3-402; Laws, 1966, ch. 316, § 3-402; Laws, 1992, ch. 420, § 40, eff from after January 1, 1993.

Cross References — Burden on plaintiff to establish liability of defendant as represented person under this section, in action to enforce instrument against person as undisclosed principal of signor of instrument, see § 75-3-308.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

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III. DECISIONS UNDER FORMER STATUTES.

28. Decisions under former Code 1942 § 60.
29. Decisions under former Code 1942 § 61.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-402, 75-3-403.

11. In general.

Forged signature of payee on front of check did not preclude defendant's conviction for forgery since UCC § 3-202(2) does not specify any specific location for an indorsement, nor was there any indication that the signature was not intended as an indorsement within the meaning of UCC § 3-402. United States v. Tufi, 536 F.2d 855 (9th Cir. Haw. 1976).

Any ambiguity as to the capacity in which a signature is made on an instrument must, under this section, be resolved that it is an indorsement, and unless the instrument itself makes it clear that one signed in some other capacity, the signer must be treated as an indorser. Grange Nat'l Bank v. Conville, 8 Pa. D. & C.2d 616 (1957).

The question of the capacity in which one signed an instrument must be determined from the face of the instrument alone. Grange Nat'l Bank v. Conville, 8 Pa. D. & C.2d 616 (1957).

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

Where first indorser on note payable to bank paid bank receiver certain sum and receiver gave receipt releasing indorser from further liability on note and the compromise settlement was made by authority of chancery court decree authorizing discharge of first indorser and holding of second indorser was unauthorized where made without second indorser's consent. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

The two statutory provisions regarding qualified indorsement and indorsement generally must be read together. Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

Indorser intending to qualify indorsement without using words "without recourse" must use words clearly expressing such intention. Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

Indorsement on note reading "this is to certify that I have this day sold all my right, title and interest to the within note and mortgage" held "general indorsement in due course." Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

One writing name in blank on back of note is an endorser. Skinner v. Mahoney, 140 Miss. 625, 106 So. 211 (1925).

One signing an instrument other than as maker, drawer, or acceptor, is endorser unless contrary intent appears. Taylor v. Ross, 129 Miss. 536, 92 So. 637 (1922); Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

12. Signature in representative capacity.

In suit on note executed by president of corporation, where (1) on front of note, immediately underneath the word "signatures", the name of the corporation was printed by hand, (2) immediately below the corporation's name, the word "by" was printed by hand and was followed by the president's signature, (3) below such signature appeared the half-printed, half-script word "President," (4) to the right of the president's signature on the front of the note also appeared the corporation's address, (5) on the back of the note, on the first of two printed lines, the president's signature appeared again, followed by the script abbreviation "pres.," and (6) below such signature, the president's address was also set forth, court held that president's indorsement of note was personal indorsement under (1) UCC § 3-402, which provides that unless the instrument clearly indicates that a signature is made in some other capacity, it is an indorsement, and (2) UCC § 3-403(2)(b), which provides that except as is otherwise established between the immediate parties, an authorized representative who signs his own name to an instrument is personally obligated if the instrument does not name the person represented, but does show that the representative signed in a representative capacity. Lanier v. Bank of Virginia—Potomac, 39 Md. App. 589, 387 A.2d 614 (1977).

Under UCC § 3-402, corporate officer's unqualified signature on back of note was endorsement where there was no clear indication within four corners of instrument that he was acting in representative capacity, and under UCC § 3-403(2)(b) parol evidence was not admissible to show that he was acting not individually but in representative capacity. Norfolk County Trust Co. v. Vichinsky, 5 Mass. App. Ct. 768, 359 N.E.2d 59 (1977).

In an action brought prior to the effective date of the UCC, the court held that as between the parties in Maryland although a person who signed a note made by a corporation is prima facie liable to the payee, if there is conflict in the evidence relative to the circumstances, the individual who signed that note is not liable if he affirmatively shows an understanding between him and the payee that there was to be no personal liability, and it observed that this same principle was embodied in the UCC. Leahy v. McManus, 237 Md. 450, 206 A.2d 688 (1965).

13. Indorser or accommodation party.

Where president of corporation signed promissory note as president of corporation and also signed note personally, under UCC § 3-402 president clearly and unambiguously did not sign promissory note in representative capacity but as "accommodation party" under UCC § 3-

415(1), making president personally liable on note. Sullivan County Nat'l Bank v. Lieman, 89 Misc. 2d 780 (1977).

In action for balance due on promissory note, where defendant claimed that he was merely accommodation indorser of note and not a comaker but admitted, as note clearly indicated, that he had signed note in lower righthand corner instead of on back where spaces were expressly provided for indorsers, defendant was liable as comaker under UCC § 3-402. Moreover, in such suit defendant's alleged accommodation status was inconsequential, since accommodation maker under UCC § 3-415 is liable on instrument without any resort to his principal. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

In action by bank as holder of promissory note against corporation and two individuals who signed note, where it was clear from face of instrument that individual signers intended to sign note other than as endorsers, but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as to capacity in which instrument was signed, and evidence that loan was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signer was director of bank, was sufficient to show that individual signers signed note as makers rather than accommodation parties. Peoples Bank v. Pied Piper Retreat, Inc., 158 W. Va. 170, 209 S.E.2d 573 (1974).

Parol evidence is admissible to show party's capacity as accommodation party; and, as payee, holder of instrument who has taken it for value has rights of holder in due course as against accommodation party who signed as maker, except where holder has induced maker to become accommodation party, as by actually agreeing that he should not be held liable as principal. Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc., 221 Pa. Super. 89, 288 A.2d 916 (1972).

Where an accommodation party signs in a manner which does not indicate his capacity he is deemed an indorser. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. Other matters.

"Envelope draft" presented by beneficiary of letter of credit to issuer was not validly drawn in accordance with letter's terms where (1) it did not contain statement, "Drawn Under National Bank of Austin Letter of Credit No. 8274," as required by such letter, and (2) instrument was not a draft under UCC § 3-104(1)(a), since drawer's alleged signature was on back of instrument and not on line in right-hand corner of face of instrument that was provided for drawer's signature (applying Illinois law, and holding that signature on back of instrument was actually indorsement under UCC § 3-402). North Valley Bank v. National Bank, 437 F. Supp. 70 (N.D. Ill. 1977).

Signature of person who signed promissory note on back under words, "Assenting to Terms and Waivers on the Face of this Note," was endorsement under UCC § 3-402, and signer was liable to bank for debt represented by note, upon default of maker, notwithstanding signer received no consideration for his signature. Community Nat'l Bank v. Dawes, 369 Mass. 550, 340 N.E.2d 877 (1976).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). First New Haven Nat'l Bank v. Clarke, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

15. In general scope.

Where promissory note was not negotiable under UCC § 3-104(1), liability of signer of such note was not controlled by Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). Central States, S.E. & S.W. Areas, Health & Welfare Fund v.

Pitman, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

UCC Sec 3-403(2)(b), in common with the other provisions of Article 3, apply only to negotiable instruments and therefore do not apply to a contract of guaranty of payment of the purchase price by a buyer. Associates Disct. Corp. v. Elgin Organ Ctr., Inc., 375 F.2d 97 (7th Cir. Ill. 1967).

16. Agent's authority.

An agent is not authorized under UCC § 3-403 to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal. If within his authority he receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses. A payee engaged in business ordinarily should deposit collection items for credit to his account. Farmers Union Coop. Ass'n v. Commercial State Bank, 187 Neb. 376, 191 N.W.2d 168 (1971).

Where administratrix had endorsed check to order of husband's estate, purported further endorsement as trustee of estate by one who was not trustee was unauthorized and ineffective. Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968), aff'd, 105 N.J. Super. 164, 251 A.2d 460 (1969).

Where business name and address were printed at top of check and nothing on face of check indicated limitation on authority of agent to sign checks for business obligation, business was liable to holder in due course for amount of checks, even though used for personal obligations of agent. Jenkins v. Evans, 31 A.D.2d 597 (3d Dep't 1968).

Where the signatures of persons intending to become partners in a business were affixed to a promissory note representing part of the purchase price by one of their number who negotiated the purchase and later became the managing partner of the business, the party who signed their names to the note was a duly authorized agent as provided in subsec. (1), and they could not later contend that the signatures were forgeries. Rehrig v. Fortunak, 39 Pa. D. & C.2d 20 (1966).

17. Agent's liability.

UCC § 3-403(1) does not expressly authorize deceptive agency arrangements whereby the signatory fails to reveal his true identity. (prosecution under 18 USCS § 1014 for making materially false statements in bank-loan application). United States v. Carr, 582 F.2d 242 (2d Cir. N.Y. 1978).

Party who signed note as agent for corporation was not personally liable thereon where letters "L.T.G. De.," which signer placed above his signature on note and which stood for "L.T.G. Development, Inc.," sufficiently named person represented, as required by UCC § 3-403(2)(b). J.P. Sivertson & Co. v. Lolmaugh, 63 Ill. App. 3d 724, 380 N.E.2d 520 (2d Dist. 1978).

UCC § 3-403(3), providing that the name of an organization preceded or followed by the name and office of an authorized individual is signature made in a representative capacity, does not expressly exempt authorized agent who signs in a representative capacity, naming his principal, from personal liability. Grotz v. Jerutis, 13 Ill. App. 3d 543, 301 N.E.2d 60 (1st Dist. 1973).

A representative signing an instrument is liable personally thereon unless the instrument itself clearly shows that he signed only on behalf of another named on the paper. Grange Nat'l Bank v. Conville, 8 Pa. D. & C.2d 616 (1957).

18. —Disclosure of principal.

Under UCC § 3-403(2), president of automobile motor sales corporation was personally liable on checks drawn by him to pay for merchandise furnished to corporation where (1) only the corporation's checking account number appeared on such checks and corporation's name was not written or printed thereon; (2) officer's signature on checks did not indicate that he was signing them in representative capacity; and (3) evidence did not show understanding between payee and drawer that drawer was acting in representative capacity. A.L. Jackson Chevrolet, Inc. v. Oxley, 564 P.2d 633 (Okla. 1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. Marine Midland Bank v. DiMarzo, 57 A.D.2d 733 (4th Dep't 1977).

In suit on note executed by president of corporation, where (1) on front of note, immediately underneath the word "signatures", the name of the corporation was printed by hand, (2) immediately below the corporation's name, the word "by" was printed by hand and was followed by the president's signature, (3) below such signature appeared the half-printed, half-script word "President," (4) to the right of the president's signature on the front of the note also appeared the corporation's address, (5) on the back of the note, on the first of two printed lines, the president's signature appeared again, followed by the script abbreviation "pres.," and (6) below such signature, the president's address was also set forth, court held that president's indorsement of note was personal indorsement under (1) UCC § 3-402, which provides that unless the instrument clearly indicates that a signature is made in some other capacity, it is an indorsement, and (2) UCC § 3-403(2)(b), which provides that except as is otherwise established between the immediate parties, an authorized representative who signs his own name to an instrument is personally obligated if the instrument does not name the person represented, but does show that the representative signed in a representative capacity. Lanier v. Bank of Virginia—Potomac, 39 Md. App. 589, 387 A.2d 614 (1977).

Under UCC § 3-403, one who signs instrument in representative capacity must, if he is to escape personal liability thereon, set out name of his principal before or after his own name and office. Custom Equip. Co. v. Young, 564 P.2d 1020 (Okla. Ct. App. 1976).

Where officers of corporation admitted execution of note but claimed that note was executed in representative capacity in behalf of corporation and where note did not give name of principal or any indication that note was signed in representative capacity, makers were personally liable on note as matter of law under UCC § 3-403(2)(a). Barden & Robeson Corp. v. Ferrusi, 52 A.D.2d 1061 (4th Dep't 1976).

In action to recover on contract of guaranty on behalf of corporation in which guarantors were officers and thus "representatives" under UCC § 1-201(35), guarantors were personally liable on contract of guaranty under UCC § 3-403, notwithstanding their claims that they signed in representative capacity and that their intention at the time of signing guaranty was not to be bound in their individual capacities, (1) where guaranty did not name any person represented and (2) where there was evidence that bank officials explained to guarantors in detail that personal guaranty would be required of them and that bank relied on their personal obligation in making loan to corporation; burden of proof was on guarantors under UCC § 3-403 to "otherwise establish" that they were not personally liable. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976), cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Corporation is "named" within Code § 3-403(b)(1) by use of its assumed name, and that section does not forbid extrinsic evidence to show further, as between original parties, that signer was not personally obligated on note, where such proof is offered not to vary terms of instrument or to show mistake, but rather to explain ambiguity with respect to capacity of signer. Nichols v. Seale, 493 S.W.2d 589 (Tex. Civ. App. 1973), rev'd, 505 S.W.2d 251 (Tex. 1974).

Where body of note did not name maker and there was nothing on face of note which showed agency of signer, fact that name similar to that of corporation asserted to be real maker of note appeared in space for address at bottom left of note did not name person represented within meaning of Code § 3-403(2)(b) so as to make question of fact as to whether signer acted in representative capacity. Southern Oxygen Supply Co. v. de Golian, 230 Ga. 405, 197 S.E.2d 374 (1973).

Under UCC § 3-403(2) provision that there may be individual liability on an instrument which "names the person represented" but does not indicate his representative capacity, the name of the person represented must clearly appear on the face of the instrument, and such was not the case where the notation "Food for Love Acc't" signified an account and suggested a direction to the drawee rather than a notice to the payee alerting it to any representational capacity in which the signature was executed. Star Dairy, Inc. v. Roberts, 37 A.D.2d 1038 (3d Dep't 1971).

Where an individual signed a promissory note as an accommodation indorser and signed as Trustee, his personal liability was unaffected, since he failed to identify the trust for which he was acting. Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968).

19. —Representative capacity; sufficient indication.

Corporation officer who signed corporate note by placing his name on line below typed name of corporation and after typed word "By," and who indicated capacity in which he signed by writing on another line word "President" after typed word "Individually," was relieved from liability under UCC §§ 3-401(1) and 3-403(2)(a), since handwritten word "President" on "Individually" line characterized officer's act as that of official of corporation. Donald M. Clement Contractor v. Demon, Inc., 364 So. 2d 204 (La. App. 1978).

Under UCC § 3-403(3), president of corporation was not personally liable on promissory note where note was signed, "Executive Funding Corporation by Vincent P. Salvione, President." Donaghey v. Executive Funding Corp., 45 Ill. App. 3d 951, 360 N.E.2d 472 (1st Dist. 1977).

Where maker of check was "McCann Industries Inc., Pay Roll Account, (signed) J.Y. McCann" liability was that of corporation and not individual defendant. Bennett v. McCann, 125 Ga. App. 393, 188 S.E.2d 165 (1972).

An officer of a corporation manually signing a check is not bound thereby because the requirement of identifying his principal and his representative capacity are met when the check carries the name and address of the corporate drawer, the notation that it is a payroll check, and carried the drawer's printed name as drawer with lines thereunder for a manual signature; and the difference between a check and a note confirms this conclusion since the check was purportedly drawn on a particular bank account set up for the payment of wages, over which the individual signer would by definition have no control. Mott v. Sewickley Sav. & Loan Ass'n, 211 Pa. Super. 357, 236 A.2d 541 (1967).

Individual who signed check without specifically designating his representative capacity was not individually liable to party cashing check, since check was designated payroll check with corporate name printed at top and in maker's position above individual signature. Pollin v. Mindy Mfg. Co., 211 Pa. Super. 87, 236 A.2d 542 (1967).

Defendant unquestionably indorsed note in his corporate capacity, where his representative capacity and name of corporation were appropriately designated on both sides of note. Trenton Trust Co. v. Klausman, 94 Montg. County L. Rep. 203 (Pa. 1971).

20. — —Insufficient indication.

Where words "We promise to pay" in note were followed by typewritten identification of makers as "Walton Drug Co., Inc., d/b/a Touchton Drugs and/or Bob Edrington, Owner," and where owner, who alleged that he signed note in representative capacity only, signed note as "Bob Edrington, President," owner could not escape personal liability on note under UCC § 3-403(3), since use of words "and/or" in identification of makers destroyed any effect that naming of principal (Walton Drug Co.) would have had as limitation on alleged agent's (Edrington's) capacity, especially in view of fact that such "agent" signed instrument on line reserved for his signature as an individual. Havatampa Corp. v. Walton Drug Co., 354 So. 2d 1235 (Fla. App. 1978).

UCC § 3-403(2)(a) requires that an agent or representative must show that he is actually representing someone. If the instrument neither names the entity represented nor shows that the representative signed in a representative capacity, the person who signed the instrument is personally obligated(where check in suit had on its face only the words "Investor's Publishing Co.," and such words were followed only by signatures of defendants with no designation of capacity in which they signed). Sterling Press v. Pettit, 580 P.2d 599 (Utah 1978).

Maker of promissory note who signed instrument with her own name "Anita Willis" on one line, and who also wrote "Anita Willis, Inc." on line below her name, was personally obligated on note under UCC § 3-403(2)(b), notwithstanding appearance on instrument of both her personal signature and also signature of her corporation, since instrument did not show in any way that she had signed it in a representative capacity. DeBlanco v. Dooley, 164 N.J. Super. 155, 395 A.2d 909 (App. Div. 1978).

Under UCC § 3-403(2)(b), signer of blank check, drawn against account of corporation of which signer was president and sole owner without indicating after his signature title of office that he held in such corporation, was personally liable on check. Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570 (W.D. Okla. 1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. Marine Midland Bank v. DiMarzo, 57 A.D.2d 733 (4th Dep't 1977).

Person who drew checks on corporation that were payable to himself as officer of such corporation for future legal services to be rendered to it, but who failed to sign checks in representative capacity, was personally obligated on such checks under UCC § 3-403(2)(b) to holder in due course who purchased checks without notice of any impediment to their collection, since purpose of UCC § 3-403(2)(b) is to prevent drawer or maker of instrument, who fails to indicate his representative capacity thereon, to contest his individual liability on instrument as against holder in due course. Financial Assocs. v. Impact Mktg. Inc., 90 Misc. 2d 545 (1977).

In suit on two dishonored checks drawn by defendant, where each check was imprinted with name of corporation and was signed by defendant, but neither signature was followed by additional language indicating that defendant had signed only in representative capacity, defendant under UCC § 3-403(2)(b) was personally liable on obligations evidenced by checks in absence of parol evidence showing that he had signed only in representative capacity. Seamon v. Acree, 142 Ga. App. 662, 236 S.E.2d 688 (1977).

President of corporation who signed corporate check, which did not show that he signed in representative capacity, was personally liable on check where he failed to show that he signed instrument in representative capacity; fact that payee had received on numerous occasions other checks drawn on corporation's bank account by other officers of corporation and that payee had never looked to those officers for payment did not constitute evidence of prior understanding or prior dealings between parties sufficient to establish signature in representative capacity, since prior dealings shown were not between president of corporation and payee, but between other officers of corporation and payee. Griffin v. Ellinger, 530 S.W.2d 329 (Tex. Civ. App. 1975), writ granted, 19 Tex. Sup. Ct. J. 229 (Tex. 1976), aff'd, 538 S.W.2d 97, 97 A.L.R.3d 791 (Tex. 1976).

Where officer of corporation signed note for loan to corporation in blank designated "Co-Maker," and also signed "Co-Maker's/Guarantor's Statement" which clearly stated that he was personally liable on such note, officer did not sign note in corporate capacity and was liable on note following default by corporation. Citibank E. v. Minbiole, 50 A.D.2d 1052 (3d Dep't 1975).

Drawer was personally obligated on check, notwithstanding his claim that he signed in representative capacity as president or general manager of corporation, where drawer's signature did not show title of his office. American Exch. Bank v. Cessna, 386 F. Supp. 494 (N.D. Okla. 1974).

Debtor who claimed to have signed promissory note as representative of corporation and not individually was personally liable under UCC §§ 3-307(b) and 3-403(b)(2) where instrument itself did not indicate that debtor was signing in representative capacity and where assertion that he intended to sign, and did sign, in representative capacity was insufficient to raise issue of fact to "otherwise establish" his representative capacity. Seale v. Nichols, 505 S.W.2d 251 (Tex. 1974).

Note bearing signature of individual and name of construction company was insufficient to establish that individual had not signed in individual capacity. Vickers v. Fireman's Fund Am. Ins. Co., 445 S.W.2d 530 (Tex. Civ. App. 1969).

Note named person represented but did not show that signer of note was signing in a representative capacity; held, signer was personally bound, and holder in due course could recover against both person represented and signer. O.P. Ganjo, Inc. v. Tri-Urban Realty Co., 108 N.J. Super. 517, 261 A.2d 722 (L. Div. 1969).

Note, bearing signature of individual with corporate name underneath without any indication that individual held any office with corporation, is joint obligation of corporation and individual, who is personally liable thereon. Perez v. Janota, 107 Ill. App. 2d 90, 246 N.E.2d 42 (1st Dist. 1969).

Where a conditional sales contract identified the company the defendant was representing, but did not show he signed the instrument in a representative capacity, the trial judge did not err in finding defendant personally liable. Blayton v. Ford Motor Credit Co., 118 Ga. App. 517, 164 S.E.2d 262 (1968).

A maker who affixes his signature to a promissory note immediately beneath the name of a corporation but with nothing to indicate he executed the instrument on behalf of the corporation in a representative capacity was held personally liable for the payment of the note; but it should be noted that by reason of the Dead Man's Statute it was impossible for the individual maker to testify concerning the transaction. Bell v. Dornan, 203 Pa. Super. 562, 201 A.2d 324 (1964).

A person was liable on the note where he, without indicating that he did so in a representative capacity, signed a promissory note in the following manner and form: "Rischall Electric Co. Inc. [and under this designation] Harold M. Rischall." Universal Lightning Rod, Inc. v. Rischall Elec. Co., 1 Conn. Cir. Ct. 623, 192 A.2d 50 (1963).

Where a note was signed, on successive lines, "John P. Conville," "Doris E. Conville," "Hughesville Mfg. Co. Inc.," and another note was signed, on successive lines, "Hughesville Mfg. Co.," "John P. Conville," "Doris E. Conville," the designated individuals were personally liable thereon, even though they were the authorized representatives of the company and intended to sign for it. Grange Nat'l Bank v. Conville, 8 Pa. D. & C.2d 616 (1957).

21. —Representative and individual capacity.

Fact that individual defendants signed promissory note individually with specificity and then signed note again with their signatures preceded by word, "by," indicated that they also signed note in representative capacity, although note did not reveal identity of person or corporation represented, and thus under UCC § 3-403(2)(b) parole testimony was admissible in suit between immediate parties to establish whether individual defendants signed note in representative, as well as individual, capacity; however, evidence, including parole testimony, failed to establish that individual defendants signed in representative capacity so as to obligate corporate defendants. Dynamic Homes, Inc. v. Rogers, 331 So. 2d 326 (Fla. App. 1976).

Individuals cosigned noted on left-hand side beneath name of corporation and in representative capacity as officers thereof; these same individuals signed right-hand side of note individually; held, they were personally liable on note even though they were acting in reliance on manager of corporation that they would not be personally liable. Manufacturers Hanover Trust Co. v. Eisenstadt, 64 Misc. 2d 397 (1970).

Where president of corporation twice signed note, once below typewritten name of corporation and once above his own typewritten name, parties clearly intended that president would be personally liable on instrument, and insertion of abbreviation "Pres." was inadvertence performed out of habit or rote not intended to alter undertaking of parties. Corbin v. Safety Container Corp., 93 Montg. County L. Rep. 22 (Pa. 1970).

22. Practice and procedure.

Where seller sought to recover total amount of purchase price (see UCC § 2-709(1)(a)) of pipe and did not seek recovery on check given by buyer in partial payment as to which payment had been stopped, trial court incorrectly held that buyer's personal liability for purchase price was governed by UCC § 3-403(2)(b), dealing with circumstances under which authorized representative can be held personally liable on commercial paper (ovrld on other grounds Reams v. Tulsa Cable Television, Inc. (Okla) 604 P2d 373; stating, on remand of cause, that issue was not who was legally liable on check, but who was liable on contract to purchase the pipe). Culpepper v. Lloyd, 583 P.2d 500 (Okla. 1978), overruled on other grounds, Reams V. Tulsa Cable Television, Inc., 604 P.2d 373 (Okla. 1979).

Under the formula in UCC § 3-403(2)(b), if the form of the agent's signature is such that reasonable persons examining the face of the instrument could arrive at different conclusions concerning whether the parties intended the agent to be bound, the agent will be bound, except as is otherwise established between the immediate parties. Havatampa Corp. v. Walton Drug Co., 354 So. 2d 1235 (Fla. App. 1978).

Suit may not be maintained or judgment obtained on promissory note against undisclosed principal whose signature does not appear thereon; thus, complaint based on promissory note alleging that maker acted as agent of defendants, did not state cause of action against defendants where their names did not appear on note and it was not alleged that note disclosed that agent signed in any capacity other than for himself individually. Ness v. Greater Ariz. Realty, Inc., 21 Ariz. App. 231, 517 P.2d 1278 (1974).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

Where promissory note was signed by corporation president with his signature, followed by dash and printed name of corporation, way in which note was signed was ambiguous; however, there was sufficient evidence to support finding that corporate president was individually and personally liable on note, and testimony of payee to effect that he was loaning money to corporation, not to corporation president, did not constitute judicial admission so as to bar his recovery from corporation president. Geer v. Farquhar, 270 Or. 642, 528 P.2d 1335 (1974).

Where promissory note was signed with handprinted name of sole proprietorship, immediately below which appeared defendants' signatures without disclosing a representative or agency relationship, court erred in denying defendants' motion to open judgment by confession to allow defendants to establish that as between them and payee of note it was agreed that signers signed only in representative capacity, and that at time note was executed, payee knew signers were unauthorized to sign in such capacity, in which case signers would have meritorious defense under Code § 3-404(1); ambiguous evidence was insufficient to meet signers' burden of overcoming presumption of consideration for promissory note. First Nat'l Bank v. Achilli, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

Where check contained on top left-hand side printed legent "Oste Bros." and beneath it an address, and defendant's signature on bottom right-hand side with nothing to indicate that signature was in representative capacity, burden was on defendant to disprove personal liability. Carleton Ford, Inc. v. Oste, 1 Mass. App. Ct. 819, 295 N.E.2d 402 (1973).

Although defendant's indorsement on promissory note was followed by notation "Sec. & Treas.," apparently connoting his representative capacity, jury should consider, on question of defendant's individual liability, all of circumstances of signing, including fact that complete, correct name of corporate defendant maker was not utilized, that defendant indorsed note on its reverse side, rather than on line for maker on face of note, and that he may have considered there to have been insufficient space in which to indorse on face of note. National Bank v. Ament, 127 Ga. App. 838, 195 S.E.2d 202 (1973).

In suit to hold agent personally liable on note, judgment on pleadings is improper where answer raises factual issue of understanding of parties as to signature in representative capacity and form of signature indicates representative capacity even though principal is not named. Kramer v. Johnson, 121 Ga. App. 848, 176 S.E.2d 108 (1970).

In determining whether a person has signed in a representative capacity, it is necessary to examine the entire instrument. Mott v. Sewickley Sav. & Loan Ass'n, 211 Pa. Super. 357, 236 A.2d 541 (1967).

Where one of the parties to the instrument contended that her signature was affixed in a representative capacity but through accident and mistake or inadvertence that fact was not shown on the note, and the payee contended that such party signed individually and that her signature and that of her husband, in their capacity as officers of the corporation, were omitted inadvertently, the result was that both parties alleged a mistake in the execution of the note, and the lower court properly exercised its discretion in reopening judgment entered by confession on the note. Pittsburgh Nat'l Bank v. Kemilworth Restaurant Co., 202 Pa. Super. 238, 195 A.2d 919 (1963).

23. —Pleading.

Unless specifically denied, the authority of a person to sign a check as agent is admitted. Gate City Furn. Co. v. Rumsey, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

Under an Arkansas pleading statute, a maker sued personally on a promissory note could not, under a plea of general denial, defend on the ground that he had executed the paper in a representative capacity, the exception provided by ¶ (b) of subd (2) of this section, for the point could only be raised under a special plea to that effect. Chiles v. Mann & Mann, Inc., 240 Ark. 527, 400 S.W.2d 667 (1966).

24. —Evidence and burden of proof.

Summary judgment was properly granted to the holder of a series of negotiable promissory notes where an authorized representative signed his own name to the instruments, which named the principal represented but did not show that the representative signed in a representative capacity, since to bring a note within the exception clause of section 3-403 (subd [2], par [b]) of the Uniform Commercial Code, which provides that an authorized representative who signs his own name to an instrument is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity, except as otherwise established between the immediate parties, there must be more than the mere self-serving allegation of the signer's subjective intent to sign as representative; to escape personal liability, the signer must establish an agreement, understanding or course of dealing to the contrary, and without an affirmative demonstration that the taker of the note knew or understood that the signer intended to execute the instrument in a representative status only, there can be no defense that, notwithstanding the form of the note, representative liability was otherwise established between the parties. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 385 N.E.2d 1068 (1978).

25. —Parol evidence; admissible.

As between the immediate parties to a negotiable instrument, parol evidence is admissible under UCC § 3-403(2)(b) to show the parties' intention where the instrument names the person represented, but does not show that the person who signed the instrument signed it in a representative capacity. In such a case, there is a presumption that the instrument was signed in an individual capacity, and the person who signed it has the burden of overcoming that presumption (holding that trial court committed reversible error in excluding parol testimony concerning understanding of parties as to defendant's capacity in signing note sued on). Rosedale State Bank & Trust Co. v. Stringer, 2 Kan. App. 2d 331, 579 P.2d 158 (1978).

In action by payee against drawer of dishonored corporate checks, where name and address of the corporation appeared at top of each check, and where drawer simply signed his name to each check and there was no indication on any check that drawer's signature had been affixed in representative capacity as officer, director, or shareholder of such corporation, drawer signed checks in individual capacity and was personally liable thereon under UCC § 3-403(2)(b), "except as otherwise established between the immediate parties." In such case, trial court erred in dismissing plaintiff's complaint, and at trial of cause relevant parol evidence would be admissible to show intention of parties as to whether drawer had signed checks in representative capacity. Medley Harwoods, Inc. v. Novy, 346 So. 2d 1224 (Fla. App. 1977).

Parol evidence was admissible to show intention of parties with respect to check which was ambiguous on its face as to whether cosignor had signed as comaker or in representative capacity. Speer v. Friedland, 276 So. 2d 84 (Fla. App. 1973).

In suit by payee of promissory note allegedly signed by individual defendant as representative of corporate defendant, even though there was no indication on instrument that individual defendant's signature was signed in representative capacity, parol evidence was admissible under UCC § 3-403(2)(b) to show that individual defendant had signed in representative capacity because (1) action was between immediate parties to instrument, and (2) name of individual defendant's alleged principal-namely, the corporate defendant-appeared on face of instrument. Sullivan County Wholesalers, Inc. v. Sullivan County Dorms, 59 A.D.2d 628 (3d Dep't 1977).

In action by endorser of promissory note against its maker where plaintiff alleged that he was manager of branch office of life insurance company, that defendant purchased insurance contract for which he executed and delivered note payable to bank, and that plaintiff endorsed note as accommodation party, where note was endorsed without recourse and was signed "Duane S. Wolfram (Manager)", and where plaintiff alleged that he paid note when defendant defaulted at due date: (1) under UCC § 3-403(2)(b) parole evidence was admissible to show whether plaintiff signed note as representative of insurance company or whether he signed note in capacity of sole proprietor making him individually liable and, thus, whether plaintiff had capacity to sue on note. Wolfram v. Halloway, 46 Ill. App. 3d 1045, 361 N.E.2d 587 (1st Dist. 1977).

Under UCC § 3-403(2)(b), comaker of promissory note should have been permitted to produce evidence to show that he had signed note in representative capacity where word "President" appeared after comaker's signature, but name of corporation he purported to represent was not on instrument. Lowry v. Lomire, 143 Ga. App. 479, 238 S.E.2d 594 (1977).

In action by payee of promissory note parol evidence was admissible to show that defendant endorsed note in representative capacity, and not as individual, where name of corporation was typewritten on maker's signature line, president of corporation signed his name on line below with designation "President," and defendant signed his name on third line without indication of agency status, but it was conceded that he signed note as maker in his capacity as officer of corporation, and where signatures of same men, including defendant's endorsement, appeared on reverse side of note in same form. Weather-Rite, Inc. v. Southdale Pro-Bowl, Inc., 301 Minn. 346, 222 N.W.2d 789 (1974).

Face of chattel mortgage note represented corporate obligation that did not personally obligate defendants whose signatures appeared on note with no designation of representative capacity, where parties all testified that it was their intention to create corporate obligation, contemporaneously executed security agreement clearly showed that corporation was party to this loan transaction, and strict application of Code § 3-403(2)(a) would create result that was contrary to clearly understood intentions of original parties. First Bank & Trust Co. v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1st Dist. 1973).

Evidence concerning intention of parties on issue of personal versus corporate liability should have been admitted in action on note where company was named but defendant's signature did not show any representative capacity. DeGolian v. Southern Oxygen Supply Co., 127 Ga. App. 504, 194 S.E.2d 265 (1972), rev'd on other grounds, 230 Ga. 405, 197 S.E.2d 374 (1973).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. Jamaica Tobacco & Sales Corp. v. Ortner, 70 Misc. 2d 388 (1972).

Extrinsic evidence was admissible to establish understanding of parties with respect to capacity of corporate officers, where note contained indorsements of all 3 officers and their corporate offices as well as indorsement in corporate name followed by signature and office of one of officers. Trenton Trust Co. v. Klausman, 222 Pa. Super. 400, 296 A.2d 275 (1972).

A note reciting "we promise to pay" and signed with both the name of a corporation and an individual is ambiguous so that as between the parties evidence is admissible to show the character in which the individual signed. Slayton v. Lomar Constr. Corp., 4 U.C.C. Rep. Serv. 955 (1967, NY Sup).

By a Pennsylvania amendment in 1959 the stringent rule of subsection (2) of this section which made a signing agent personally liable unless the instrument itself both named the principal and disclosed the agency relationship was changed to provide that an agent who has complied with one of the two statutory requirements may show the other requirement by evidence outside the instrument, and this rule was applied in the case of a promissory note executed on behalf of a corporation by an individual who did not show that he executed the instrument in a representative capacity. Walton v. William H. Corby, Inc., 33 Pa. D. & C.2d 703 (1963).

26. — —Inadmissible.

UCC § 3-403(2)(a), providing that authorized representative who signs his own name to an instrument is personally obligated if instrument neither names person represented nor shows that representative signed in representative capacity, is in accord with Illinois case law which holds that one who signed as maker without qualification cannot introduce, in action by payee to enforce such instrument, parol evidence to alter capacity in which he signed. Metropolitan Lumber Co. v. Dodge, 567 S.W.2d 729 (Mo. Ct. App. 1978).

To make commercial paper freely negotiable without undue risk, the basic law is that resort to extrinsic proof is impermissible when the face of the instrument itself does not serve to put its holder on notice of the limited liability of a signer. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 385 N.E.2d 1068 (1978).

Under UCC § 3-402, corporate officer's unqualified signature on back of note was endorsement where there was no clear indication within four corners of instrument that he was acting in representative capacity, and under UCC § 3-403(2)(b) parol evidence was not admissible to show that he was acting not individually but in representative capacity. Norfolk County Trust Co. v. Vichinsky, 5 Mass. App. Ct. 768, 359 N.E.2d 59 (1977).

Where instrument for payment of money was written on personalized check form, individual defendants' names were printed at top of form and their signatures appeared at bottom right-hand corner, where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of $12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. Kaminsky v. Van Dusen, 88 Misc. 2d 833 (1976).

Where corporation admitted liability on promissory notes signed by officers of corporation in their representative capacities, it was error to have allowed parol evidence as to individual liability thereon where completely inconsistent with written instrument. Wright v. Seco Metals, Inc., 38 Mich. App. 410, 196 N.W.2d 341 (1972).

27. —Sufficiency of evidence.

In action on promissory note, defendant who merely signed note with word "by" preceding his name was liable, under UCC § 3-403(2)(a), on note in individual capacity as maker where note did not name person represented or show that defendant had signed instrument in representative capacity. In such case, word "by" preceding defendant's signature, without more on face of note, did not show that defendant had signed note in representative capacity, and extrinsic evidence was not admissible to show that defendant had signed instrument as representative of corporation. Giacalone v. Bernstein, 348 So. 2d 679 (Fla. App. 1977), cert. denied, 354 So. 2d 980 (Fla. 1977).

There was sufficient evidence to raise question of fact as to whether endorser had actual, apparent or implied authority to endorse three checks on behalf of corporate payee where, inter alia, endorser had authority to pick up checks from various customers of payee, including customer who drew checks in question, solicit jobs and make bids on contracts, sign his own name to business letters on payee's stationary, and make deposits for payee in its bank account. W.R. Grimshaw Co. v. First Nat'l Bank & Trust Co., 563 P.2d 117 (Okla. 1977).

Under UCC § 3-403(2)(b), authorized representative was liable on note that he signed "Farnan Advertising Public Relations by A. J. Farnan," despite such representative's contention that he was not liable because records of secretary of state showed that true name of principal was "Farnan Advertising Agency, Inc." Farnan v. National Bank, 142 Ga. App. 777, 236 S.E.2d 923 (1977).

In action to obtain deficiency judgment against president of corporation after sale of collateral securing note, corporation president was entitled to introduce parol evidence to establish requisite agency status to avoid personal liability where note was signed "LaFayette Transportation Service (Seal)," followed by signature of corporation president, "x(s) James L. DeBruhl (Seal)," and evidence was sufficient to support finding that payee of note knew or should have known that corporation president was acting for and as president of corporation and that he did not sign note and security agreement as individual, but as president of corporation. North Carolina Equip. Co. v. DeBruhl, 28 N.C. App. 330, 220 S.E.2d 867 (1976), review denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

In action under usury statute by individual signers of corporate promissory note against bank to recover interest and penalty on allegedly usurious loan, whether note was usurious depended on construction of note in accordance with nature of parties' obligations as represented by their signatures and there was sufficient evidence to present disputed fact question as to capacity in which plaintiffs signed note, although five signatures on note were unqualified individual signatures and could leave those signing personally obligated under UCC § 3-403(2)(a), where bank claimed that they signed as guarantors of corporate loan and sought to introduce parole evidence under UCC § 3-415(3) to establish such claim and where there was evidence that it was understood by parties that interest rate being charged was not usurious interest because it was being charged to corporation and not individuals. Pinemont Bank v. DuCroz, 528 S.W.2d 877 (Tex. Civ. App. 1975), ref. n.r.e (Jan. 28, 1976).

Where three-man law partnership was dissolved when one partner left firm but other two partners continued practice under new partnership, where bank account of former partnership was kept open for purpose of depositing receivables of former firm, where check made payable to withdrawn partner and one of his former partners was received by new partnership, bookkeeper rubber-stamped check with indorsement of former partnership, bank deposited proceeds in former partnership account, and where new partnership subsequently withdrew money from former partnership account and withdrawn partner sued bank and former partner alleging conversion of check, judgment in favor of bank and former partner was upheld on two grounds: (1) Since indorsement may be made by agent under UCC § 3-403, and agent's authority may be actual, implied or apparent under UCC § 1-201(43), there was sufficient evidence to support conclusion that apparent authority existed for affixing rubber stamp in lieu of withdrawn partner's signature; (2) Record further supported defense predicated upon UCC § 3-419(3), since there was expert testimony to effect that under circumstances handling of check was in accord with reasonable commercial standards and, although bank knew former partnership had dissolved, it was logical for its account to be kept open for purpose of depositing fees which were subsequently collected for services rendered by old firm. Keane v. Pan Am. Bank, 309 So. 2d 579 (Fla. App. 1975).

In an action brought prior to the effective date of the UCC, the court held that as between the parties in Maryland although a person who signed a note made by a corporation is prima facie liable to the payee, if there is conflict in the evidence relative to the circumstances, the individual who signed that note is not liable if he affirmatively shows an understanding between him and the payee that there was to be no personal liability, and it observed that this same principle was embodied in the UCC. Leahy v. McManus, 237 Md. 450, 206 A.2d 688 (1965).

III. DECISIONS UNDER FORMER STATUTES.

28. Decisions under former Code 1942 § 60.

Bank not "holder for value" of check endorsed in blank and deposited for collection. Bank of Gulfport v. Smith, 132 Miss. 63, 95 So. 785 (1923).

Bank paying a depositor full amount of check on same day presented becomes holder for value. Bank of Gulfport v. Smith, 132 Miss. 63, 95 So. 785 (1923).

Rights of bank and methods of procedure upon presentation by deposit of check against conditional credit stated. Bank of Gulfport v. Smith, 132 Miss. 63, 95 So. 785 (1923).

"Holder for value" is one who has given value for the instrument. Bank of Gulfport v. Smith, 132 Miss. 63, 95 So. 785 (1923).

Unauthorized alteration of note may be ratified by owner. Coulson v. Stevens, 122 Miss. 797, 85 So. 83 (1920).

Agent authorized to accept and collect note could not alter it or ratify alteration. Coulson v. Stevens, 122 Miss. 797, 85 So. 83 (1920).

"Implied authority" of agent is only that which is proper, usual, and necessary to exercise of authority expressly granted. Coulson v. Stevens, 122 Miss. 797, 85 So. 83 (1920).

29. Decisions under former Code 1942 § 61.

Where a note given to a supplier by a corporate wholesaler was signed by the wholesaler's vice president as the vice president, and contained a marginal notation that the note was secured by the signatories signing thereon, and the first part of the notation was part of the printed form of the note, but the last part was typewritten, and the vice president denied that the note contained the typewritten words when it was signed by him, the evidence was insufficient to hold the vice president personally liable on the note. Case apparently decided under former § 61. Laher Spring & Elec. Car Corp. v. Breckenridge, 221 So. 2d 718 (Miss. 1969).

Where person signing instrument as agent does so with authority he is not liable thereon but if not duly authorized he is personally liable on such instrument. Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949).

Where guardian signed instrument as agent for partnership consisting of minor ward and mother, minor was not bound, and since partnership of only one person cannot exist, the partnership was nonexistent and as agent for nonexisting principal guardian is liable personally on note. Shemper v. Hancock Bank, 206 Miss. 775, 40 So. 2d 742 (1949).

An officer of a corporation who signed the corporate name by himself to an accommodation note which was beyond the power of the corporation to undertake was not personally liable on the note. Ketcham v. Mississippi Outdoor Displays, Inc., 203 Miss. 52, 33 So. 2d 300 (1948).

If execution of note signed by defendant as administratrix was not authorized by law, defendant was personally liable on note. Orgill Bros. v. Perry, 157 Miss. 543, 128 So. 755 (1930).

RESEARCH REFERENCES

Am Jur. 19A Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2077 et seq. (commercial paper, signature by authorized representative).

§ 75-3-403. Unauthorized signature.

(a) Unless otherwise provided in this chapter or Chapter 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this chapter.

(b) If the signature of more than one (1) person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter which makes the unauthorized signature effective for the purposes of this chapter.

SOURCES: Former § 75-3-403: Codes, 1942, § 41A:3-403; Laws, 1966, ch. 316, § 3-403; Laws, 1992, ch. 420, § 41, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. [Reserved for future use].
2. Payment upon forged signature; liability.

3.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-404.

11. In general.
12. Payment upon forged signature; liability.
13. Good faith.
14. Ratification.
15. Precluding assertion of lack of authority.
16. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

I. DECISIONS UNDER CURRENT LAW.

1. [Reserved for future use].

2. Payment upon forged signature; liability.

Bank was not entitled to summary judgment on its claim that a debtor was liable for the unpaid balance of a loan her husband obtained by forging the debtor's signature on loan documents two years before she declared Chapter 7 bankruptcy. Although the debtor did not notify authorities that a crime occurred and made payments on the debt, there was evidence in the record which showed that the debtor's actions were not truly voluntary, which precluded summary judgment. Hancock Bank v. Bates (In re Bates), — Bankr. —, 2010 Bankr. LEXIS 1780 (Bankr. S.D. Miss. May 27, 2010).

3.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-404.

11. In general.

Under UCC § 3-404(1), forged indorsements are inoperative as signatures of payee, regardless of whether they are indorsements for deposit or indorsements in blank, unless such indorsements are ratified by person whose name is signed or such person is precluded from denying authority to make indorsements. Mott Grain Co. v. First Nat'l Bank & Trust Co., 259 N.W.2d 667 (N.D. 1977).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signature of the payee under §§ 3-404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

12. Payment upon forged signature; liability.

Depositary bank which accepted check payable to two joint payees, forwarded check to drawee bank for collection, and credited full amount of check's proceeds to account of joint payee who, without authority of other joint payee, had indorsed check in names of both payees, was liable to joint payee whose signature had wrongfully been indorsed, since unauthorized indorsement of such signature was inoperative under UCC § 3-404(1) and collection of proceeds of check based on an unauthorized indorsement constitutes conversion. Equipment Distribs., Inc. v. Charter Oak Bank & Trust Co., 34 Conn. Supp. 606, 379 A.2d 682 (Super. Ct. 1977).

Bank which was authorized depositary of plaintiff was liable to plaintiff in conversion under UCC § 3-404(1) for face amount of 17 third-party checks which were made payable to plaintiff and were indorsed without authority by plaintiff's manager and deposited in manager's personal account, where bank failed to inquire as to manager's authority to negotiate such checks. Mott Grain Co. v. First Nat'l Bank & Trust Co., 259 N.W.2d 667 (N.D. 1977).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. Sumiton Bank v. Funding Sys. Leasing Corp., 512 F.2d 774 (5th Cir. Ala. 1975).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in duE course. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check for the loan amount made payable to the borrower and his father-in-law, which check was subsequently cashed at Bank 2 upon the borrower's endorsement and an unauthorized endorsement purportedly the signature of the father-in-law, and such check was eventually presented to Bank 1 and paid by it, Bank 2 was liable to Bank 1 under UCC §§ 3-404(1) and 4-207(2)(b). Franklin Nat'l Bank v. Chase Manhattan Bank, 68 Misc. 2d 880 (1972).

Under UCC § 3-404(1), a bank breaches its agreement with a customer when it pays the holder of a forged check, and it is this breach which constitutes the customer's cause of action against a bank to recover sums paid out on checks bearing forged signatures. Hardex-Steubenville Corp. v. Western Pa. Nat'l Bank, 446 Pa. 446, 285 A.2d 874 (1971).

Payments made on forged or unauthorized endorsements are at the peril of the bank unless it can claim protection upon some principle of estoppel. Gotham-Vladimir Adv., Inc. v. First Nat'l City Bank, 27 A.D.2d 190 (1st Dep't 1967).

As between the payor bank and its customer, the bank bears the risk of making payment upon a forged indorsement of the payee's name. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

Payee of check has cause of action against collecting bank which has paid check made payable to joint payees bearing indorsement by one payee signing his own name and forging that of his joint payee. Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368 (2d Dist. 1967).

Since chief clerk of county commissioners, a public official, did not have authority, either actual or implied, to indorse checks belonging to the county or to an institution district, and to receive cash therefor, and the defendant bank, in dealing with the chief clerk, was bound to recognize his lack of authority in that regard, defendant bank was not the holder in due course, and county could recover from defendant bank for its act in paying proceeds of checks belonging to the county and the institution district to the chief clerk. Huntingdon County v. First-Grange Nat'l Bank, 20 Pa. D. & C.2d 418 (1960).

13. Good faith.

In bank's action to recover on promissory notes, where evidence revealed (1) that notes had been executed by defendant members of limited partnership to partnership itself, which had been formed to sell apartment projects, and (2) that corporate developer of project, which was sole general partner and managing agent of the limited partnership, had indorsed notes to itself in its corporate capacity, without required written consent or ratification of all of the limited partners, and has sold notes at discount to plaintiff, (1) plaintiff under UCC § 3-304(2) was not holder of notes in due course, since it knew that transferor had negotiated them to plaintiff without authority for transferor's sole benefit, (2) unauthorized indorsement of notes by limited partnership was wholly inoperative under UCC § 3-404(1) against both partnership itself and its members, and (3) even though partnership was not party defendant to action, in essence it was before the court, in the person of the defendant partners, within meaning of UCC § 3-306(d), since such partners were asserting their own rights and not rights of third person. Chemical Bank v. Ashenburg, 94 Misc. 2d 64 (1978).

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature...on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. However, corporation failed to establish lack of ordinary care by bank where bank assigned clerk, who was responsible for approximately 200 accounts and who examined all checks from each account daily, comparing signatures on checks with memorization of signature on customer's signature card, where forgeries were sufficiently adroit so as to escape detection by such methods, and where method used by bank was substantially same as that employed by other commercial banks in area. On other hand, customer did establish bank's lack of ordinary care with respect to altered checks where alterations were so maladroitly performed that they should have been readily discovered. Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n, 530 S.W.2d 743 (Mo. Ct. App. 1975).

14. Ratification.

Where (1) plaintiff lending bank issued cashier's check for $3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through codefendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

Under UCC § 3-404(2), a forged signature may be adopted. The word "ratified" is used in the statute in order to make it clear that the adoption is retroactive, and that it may be found from conduct as well as from express statements. However, the statute makes ratification effective only for the purposes of UCC Article 3. The unauthorized signature becomes valid so far as its effect as a signature is concerned. But although ratification will relieve the actual signer from liability on the signature, it will not, of itself, relieve him from liability to the person whose name is signed. Moreover, it does not in any way affect the criminal law. Thus, while ratification of a signature may be taken into account, along with other relevant facts, in determining punishment, it will not relieve the signer of criminal liability. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Pursuit by plaintiff of forger to recover payments for plaintiff's losses from check did not constitute ratification of unauthorized indorsement under UCC § 3-404. Twellman v. Lindell Trust Co., 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Under UCC § 3-404, payee, a general contractor, ratified unauthorized indorsements of checks by subcontractor so as to preclude recovery from collecting and drawee banks and from drawer of checks where payee made no demand against either banks or drawer after learning of unauthorized indorsements, but continued to do business with subcontractor for six months at which time subcontractor stopped working for payee and payee changed its position of acquiescence and affirmance of subcontractor's acts and attempted to hold drawer and bank liable on basis of subcontractor's lack of authority to negotiate checks. Thermo Contracting Corp. v. Bank of N.J., 69 N.J. 352, 354 A.2d 291 (1976).

In action involving loan to corporation, evidenced by promissory note executed by corporation and individually by its president and three of its principal shareholders, evidence supported finding that one shareholder had ratified his forged signature where, after he discovered forgery, he had benefitted financially from corporation, whose continued survival was made possible by loan, where he delayed exposing forgery to avoid casting suspicion on other two shareholders, and where he assured lender he was doing everything possible to bring loan current and failed to repudiate his signature until he became convinced that corporation was hopelessly insolvent; under UCC § 3-404 a forged signature may be ratified even where the forger is not the agent of the purported signer. Common Wealth Ins. Sys. v. Kersten, 40 Cal. App. 3d 1014 (4th Dist. 1974).

In action to recover payment of check upon unauthorized indorsement, fact that plaintiffs asserted their claim against payee and collecting bank, and refused offer by payee, supported finding that plaintiffs did not intend ratification of unauthorized indorsement. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

When payees accepted payments due them from proceeds of checks, unauthorized endorsements thereon were ratified by persons or companies whose names had been forged. Starkey Constr., Inc. v. Elcon, Inc., 248 Ark. 958, 457 S.W.2d 509 (1970).

Where plaintiff's bookkeeper, in order to conceal her embezzlements, forged a check on his inactive account and deposited it to his credit in an active account where there was an overdraft, the plaintiff was denied recovery against the drawee bank which paid the forged check for, by retaining the sum deposited in his active account, he suffered no damage and, in effect, ratified the unauthorized signature. Wiest v. National Bank, 10 Lycoming R. 125 (Pa. 1966), aff'd, 209 Pa. Super. 751, 226 A.2d 227 (1967).

Partners whose signatures were affixed to a promissory note representing part of the consideration for the purchase price of a business who for many years allowed without demur the party who placed their names on the note to act as sole manager of the business had ratified his signing of the note in their behalf. Rehrig v. Fortunak, 39 Pa. D. & C.2d 20 (1966).

15. Precluding assertion of lack of authority.

Where (1) insurance drafts, payable to two corporate payees, were sent to one corporate payee of which defendant was president and principal stockholder, indorsed while in such payee's possession, and thereafter deposited in another corporation's account with plaintiff bank, and (2) such other corporation was owned by defendant, court held that trial court did not commit error in concluding that defendant was fully responsible under UCC § 3-404(1), dealing with effect of unauthorized signatures, for unauthorized indorsement of second payee in view of (1) evidence by plaintiff that defendant had informed plaintiff's accounts officer that second payee had authorized defendant to indorse and deposit drafts into such other corporation's account with plaintiff, and (2) evidence by second payee that its indorsement of drafts was unauthorized. First Nat'l Bank of Commerce v. Davis, 365 So. 2d 8 (La. App. 1978).

Under UCC § 3-404(1), payee's receipt of proceeds of check bearing payee's forged indorsement might preclude payee's denial of indorsement's authenticity and assertion of forgery and, if denial of signature was precluded, then signature would be operative and collecting bank would not be required to bear any loss from taking check with forged indorsement. Bank of W. v. Wes-Con Dev. Co., 15 Wash. App. 238, 548 P.2d 563 (1976).

In conversion action against both collecting and payor banks to recover amounts of instruments handled by them on forged endorsements, where there was substantial evidence to support finding that plaintiffs had been negligent in failing to discover forging secretary's defalcations as of date approximately 6 months following their commencement, and that such negligence substantially contributed to making of subsequent forged endorsements, plaintiffs were precluded by Code § 3-404 from denying forged signatures were operative endorsements. Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Because of bank's negligence in not insisting on written instructions from depositor before canceling unendorsed treasurer's check and transferring funds to another bank upon instructions contained in letter from person claiming to be agent for depositor, depositor was not precluded in action to recover funds represented by treasurer's check from asserting agent's lack of authority. Taylor v. Equitable Trust Co., 269 Md. 149, 304 A.2d 838 (1973).

Where the drawer of checks and his accountant both testified that the proceeds of the checks actually reached the payee corporation which maintained no bank account of its own but used the account of a predecessor corporation, and the drawer who was the majority stockholder in the payee corporation failed to supervise its banking activities, the drawer was not entitled to recover from drawee banks which had paid checks indorsed in name of predecessor rather than the payee corporation. Gotham-Vladimir Adv., Inc. v. First Nat'l City Bank, 27 A.D.2d 190 (1st Dep't 1967).

16. Practice and procedure.

Where promissory note was signed with handprinted name of sole proprietorship, immediately below which appeared defendants' signatures without disclosing a representative or agency relationship, court erred in denying defendants' motion to open judgment by confession to allow defendants to establish that as between them and payee of note it was agreed that signers signed only in representative capacity, and that at time note was executed, payee knew signers were unauthorized to sign in such capacity, in which case signers would have meritorious defense under Code § 3-404(1); ambiguous evidence was insufficient to meet signers' burden of overcoming presumption of consideration for promissory note. First Nat'l Bank v. Achilli, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

A judgment entered on a note which is forged is a void judgment and consequently a sale made in execution on the judgment does not pass title to even a good faith buyer. Harris v. Harris, 428 Pa. 473, 239 A.2d 783 (1968).

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank and with whose signature it is not familiar, and under no duty to become familiar. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where a credit association was induced to make a loan to a property owner's brother on the latter's representation that he was the owner of the property used as security, and the association's agent told a merchant about the loan and asked him to cash the loan check, which was issued in the name of the real owner of the property, the association, its agent and the merchant all believing that the name of the borrower was that appearing on the check, although he was known by a different name, the merchant, in cashing the check upon indorsement by the borrower in the name appearing on the check, was acting in good faith, and so was not chargeable under the statute relating to notice of infirmity in a negotiable instrument or of defect of title of the person negotiating it. Hattiesburg Prod. Credit Ass'n v. McNair, 193 Miss. 615, 10 So. 2d 97 (1942).

Where the drawer delivers a check, draft or bill of exchange to an impostor supposing that he is the person whom he has falsely represented himself to be, and that his false representations as to his ownership or authority in regard to the property offered as security for the loan or a consideration for the paper are true, the impostor's subsequent indorsement of the paper in the name by which the payee is described is to be regarded as a genuine indorsement so far as the rights of subsequent parties who deal with the paper in good faith are dependent thereon. Hattiesburg Prod. Credit Ass'n v. McNair, 193 Miss. 615, 10 So. 2d 97 (1942).

Bank's payment of check to payee's agent on latter's forged indorsement of payee's name after deposit of balance of proceeds above amount of payee's note to personal credit of one receiving check as security for note was payment out of bank's funds, not depositor's account. Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent, crediting agent's account therefor. Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

§ 75-3-404. Impostors; fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (Section 75-3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

SOURCES: Former § 75-3-404: Codes, 1942, § 41A:3-404; Laws, 1966, ch. 316, § 3-404; Laws, 1992, ch. 420, § 42, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-405.

11. In general.
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I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-405.

11. In general.

The Official Comments to UCC § 3-405(1)(c) contemplate that losses resulting from fraudulent employee behavior in causing the issuance of checks to payees intended to have no interest therein should be a risk of the employer's business and not of the banking community, since the employer is in a better position than the banks to prevent the success of such frauds. However, the Official Comments assume that such checks will never be delivered to the payees named therein, whether or not they are real persons or entities (holding that UCC § 3-405(1)(c) had no application where check made payable to bank, under mistaken belief that drawer owed bank amount for which check was drawn, was actually delivered to bank and was negotiated by it). Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

As carried forward from the Negotiable Instrument Law a negotiable instrument is treated as payable to bearer where if it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

The effect of UCC § 3-405 is to put the loss on the customer and not on the bank. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

The rule that one who makes and delivers a check to an imposter, whom he believes to be the named payee, cannot recover from the drawee bank which pays the check on a forged indorsement by the imposter of the payee's signature will still be the law under the Pennsylvania Uniform Commercial Code. Davis v. Western Union Tel. Co., 35 Wash. C. R. 276 (1954).

12. Purpose.

The purpose of UCC § 3-405 is to promote negotiability. First Pa. Banking &

Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

13. Indorsement requirement.

In order for the "padded payroll" defense of UCC § 3-405(1)(c) to be applicable, the forged indorsement must be in the exact name of the named payee. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Issuing and collecting banks did not have defense of UCC § 3-405(1)(c) where forged indorsement was not "in the name of a named payee" as specified by statute. Twellman v. Lindell Trust Co., 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Code will not exempt drawee bank from liability on check payable to fictitious payee in absence of some indorsement thereon. Wright v. Bank of Cal., 276 Cal. App. 2d 485 (1st Dist. 1969).

14. Imposter-payee requirement.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where (1) plaintiff lending bank issued cashier's check for $3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through codefendant bank for collection, both banks indorsed check "P.E.C.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared no where on instrument; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. Federal Ins. Co. v. Groveland State Bank, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Where borrower obtained check, drawn to himself and automobile dealer, by misrepresenting to lender-drawer that he was purchasing automobile, and obtained payment of check upon forged indorsement of dealer from collection bank, which forwarded check to drawee bank, which paid check to collecting bank and charged account of drawer, "imposter rule" of § 3-405 was not applicable as defense to drawee bank's action against collecting bank for repayment under § 4-207. East Gadsden Bank v. First City Nat'l Bank, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Collecting bank which accepted plaintiff bank's cashier's check with unauthorized endorsement could not rely upon protection of imposter rule, where person who presented check to collecting bank did not claim to be payee but only agent of payee. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check made payable to the borrower and his father-in-law, and the check was subsequently cashed at Bank 2 upon the borrower's endorsement and an unauthorized endorsement purportedly the signature of the father-in-law, the "impostor payee" provisions of UCC § 3-405 did not apply to the unauthorized endorsement so as to relieve Bank 2 from liability to Bank 1. Franklin Nat'l Bank v. Chase Manhattan Bank, 68 Misc. 2d 880 (1972).

15. Imposter's inducement of maker or drawer.

Where (1) drawer signed 27 checks, each naming as payee a firm to which payment was due, (2) drawer's bookkeeper, after presenting such checks to drawer and having them signed, forged payee's indorsement thereon and diverted them into personal account at defendant bank, and (3) drawer then sued defendant for wrongfully debiting drawer's account for such checks, bank could not escape liability by reliance on UCC § 3-405(1)(c), which provides that indorsement by any person in name of named payee is effective if employee of drawer supplied drawer with name of payee with intent that payee have no interest in the instrument, since all checks in issue had been prepared as result of bona fide business transactions between named payee and drawer, and thus drawer's employee did not "supply" drawer with name of payee, but simply converted checks to employee's own use (observing that in such case, creditor-payee is the person who supplies drawer with name of payee and that drawer's fraudulent employee, in essence, has simply stolen the checks, thereby rendering his forged indorsements ineffective). Danje Fabrics Div. of Kingspoint Int'l Corp. v. Morgan Guar. Trust Co., 96 Misc. 2d 746 (1978).

Purchaser of cashier's check which was obtained from purchaser by fraud and paid in contravention of stop order was not entitled to recover amount of check from collecting or drawee bank, although check was made payable to "James Baird," an employee of an oil exploration company, whose endorsement was forged on check, where person named "James F. Beaird, Jr.," who posed as employee of oil exploration company, dealt directly with purchaser, purchaser was induced by him to purchase check, check was purchased by purchaser as consideration for oil lease and presented to imposter personally. Covington v. Penn Square Nat'l Bank, 545 P.2d 824 (Okla. Ct. App. 1975).

The words "or otherwise" in subdivision (1)(a) of this section are sufficiently broad to impose liability upon the "innocent" drawer of a check made payable to an imposter and his confederate even though there is no direct communication between the imposter and the drawer, and the impersonation took place in the presence of third persons. Philadelphia Title Ins. Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222, 23 A.L.R.3d 925 (1965).

16. Signer's intent regarding payee's interest.

In action by corporation, as drawer against drawee bank to recover proceeds of 24 checks paid by bank, where evidence showed (1) that each check that was fraudulently cashed had had plaintiff's signature imprinted on it by facsimile signature machine maintained in plaintiff's accounting department, (2) that operation of such machine was normally under control of either plaintiff's assistant treasurer or one of plaintiff's accountants, (3) that an accountant had actually "signed" three of the 24 checks in issue, but had had nothing to do with placing name of any particular payee on any check, and (4) that accountant was involved in scheme for fraudulently cashing such checks and diverting proceeds thereof, court held (1) that accountant's testimony that he had intended to convert the three checks on which he had impressed plaintiff's signature prior to time checks came to him for impression of such signature was inherently incredible, and (2) that as a result, bank could not successfully defend its action in paying checks by resorting to UCC § 3-405(1)(b), which provides that indorsement by any person in name of named payee is effective if person signing on behalf of drawer intended payee to have no interest in instrument (holding that accountant had not formed intent to misappropriate any particular check until after it had been "signed" by facsimile machine). Dayton, Price & Co. v. First Nat'l City Bank, 64 A.D.2d 563 (1st Dep't 1978), appeal denied, 45 N.Y.2d 712 (1978).

A party may successfully employ the "padded payroll" defense of UCC § 3-405(1)(c) by showing the following: (1) that a person indorsed the check in the name of the named payee, (2) that such person was an agent or employee of the drawer, (3) that such person supplied the payee's name to the drawer, and (4) that such person did not intend that the named payee should have any interest in the check. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where forger, using stolen, preprinted checks belonging to plaintiff construction company and utilizing plaintiff's facsimile check signature machine (or perfect copy of signature produced by such machine), drew checks in plaintiff's name to order of two probably fictitious sole proprietorships, and where unknown person subsequently deposited such checks, after indorsing them with probably fictitious name in individual and not representative capacity, and then withdrew such funds from depositary bank, (1) plaintiff's loss was forged check loss and not indorsement loss; (2) indorsements, whether genuine or fictitious, on checks were effective under UCC § 3-405(1)(b), since named payees were not intended to have any interest in checks; (3) indorser's failure to indorse checks in representative capacity did not shift plaintiff's loss to depositary, collecting, and drawee banks under theories of improper payment, breach of title warranty, and conversion, since there were no true payees to demand payment and thus subject plaintiff to double liability; and (4) depositary and collecting banks, on satisfying requirement of final payment rule in UCC § 3-418 as to being holders in due course, could assert protection of such rule against plaintiff's causes of action for common-law negligence and restitution in connection with banks' handling of forged checks, despite incomplete indorsements on such checks. Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. Ga. 1977), reh'g denied, 557 F.2d 823 (5th Cir. Ga. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where borrower who was given line of credit by bank for purchase of cattle executed "bill of sale drafts" drawn on bank with intention that payee of drafts, a cattle seller, would have no interest in them and borrower or his agent placed forged signatures of payee on both face and back of instruments, endorsements on instruments were effective under UCC § 3-405(1)(b); accordingly, warranties given by collecting bank under UCC § 4-207(1) were not breached and collecting bank did not convert instruments. Kansas Bankers Sur. Co. v. Bank of Odessa, 386 F. Supp. 555 (W.D. Mo. 1974).

Collecting bank which guaranteed indorsement of fictitious payee was not liable under § 4-207 for breach of warranty to drawee bank which paid check and thus sustained no insured loss in refunding payment. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where plaintiff's assistant comptroller drew checks on plaintiff corporation payable to fictitious company whose name lacked only the term "Inc." in name of plaintiff, but did not intend plaintiff corporation to have any interest in checks which were sent to third party who would endorse checks in payee's name and deposit them in defendant bank in account showing third party as president and authorized signatory, any loss arising from such transaction must fall upon plaintiff corporation which employed dishonest signing agent and no liability attached to defendant bank for accepting deposits made by third party or in dispersing funds thereof on checks written by him. Braswell Motor Freight Lines v. Bank of Salt Lake, 28 Utah 2d 347, 502 P.2d 560 (1972).

Drawer of check could not recover from drawee bank amount of drawer's check paid by bank on forged signature of wife of payee where drawer did not intend wife of payee to have any interest in check, and where entire proceeds of check had been paid to husband-payee whom drawer intended to have full interest in money. Gordon v. State St. Bank & Trust Co., 361 Mass. 258, 280 N.E.2d 152 (1972).

Where payee's name was included on check "in the normal course of [bank] business" and "as a matter of policy" because payee was intended ultimately to receive check proceeds on transfer of title to automobile, payee was intended by drawer to have an interest in check and endorsement of payee's name by another cannot be legally effective. Franklin Nat'l Bank v. Chase Manhattan Bank, 68 Misc. 2d 880 (1972).

X pretends to be A; if drawer issues check to X payable to A, imposter defense is available; drawer intended to issue check to X, imposter, albeit in name of A, person impersonated; held, A's forged endorsement is effective; action by drawer's surety to recover from drawee bank for paying checks over forged endorsement, dismissed. Fidelity & Deposit Co. v. Manufacturers Hanover Trust Co., 63 Misc. 2d 960 (1970).

A payor-drawee bank cannot recover from the collecting bank for the breach of a warranty that the signature of the payee on the endorsement was genuine where the signature, otherwise a forgery, comes within the impostor provision of UCC § 3-405(1)(b) by which an endorsement forged by the payee is effective as negotiation, because the payor-drawee bank can show no loss as caused by the forgery. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

17. Indorsement by agent or employee of maker or drawer.

The drawer of a check may sue a depositary bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depositary bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depositary bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Since the checks stolen, forged and then cashed by plaintiff's accounts payable bookkeeper were legitimate and bona fide payments due and owing to the named payee legitimately based upon open invoices due and owing to the payee, which arose out of the normal business relationship between plaintiff and the payee, and were not based on fraudulent transactions, section 3-405 (subd [1], par [c]) of the Uniform Commercial Code, which provides that an indorsement "by any person in the name of a named payee is effective if * * * an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest" does not operate to relieve the drawee bank from liability for wrongfully debiting plaintiff's account for the checks containing forged payee's indorsements since, in such an instance, the creditor "supplied" plaintiff with the name of the payee not plaintiff's employee, who stole the checks, thereby making his forged indorsements ineffective. Danje Fabrics Div. of Kingspoint Int'l Corp. v. Morgan Guar. Trust Co., 96 Misc. 2d 746 (1978).

Where (1) checks of corporation were required to be issued only on signature of two corporate officers and one of them signed a number of checks in blank each week to accommodate corporation's needs; (2) where one of such presigned, in-blank checks was later signed by other corporate officer who, after making such check payable to first officer without first officer's authorization or knowledge, then indorsed first officer's name on back of check and also added his own indorsement thereunder; and (3) where such check was thus drawn as devious method by second officer of drawing check to his own order or to cash, court would grant second officer's motion to dismiss indictment charging him with forged indorsement of first officer's name. Although UCC § 3-405(2) provides that nothing therein shall affect criminal or civil liability of person who indorses instrument in name of named payee under conditions specified in UCC § 3-405(1), UCC § 3-405(2) did not render second officer's indorsement of payee's signature a forgery, since this was case within scope of UCC § 3-405(1)(c) in which agent of drawer of check had supplied drawer with name of payee who was not intended to have any interest in check, and under UCC § 3-405(1)(c), indorsement by any person in name of payee who is not intended to have any interest in check is effective (observing that criminal liability of second officer might have extended to larceny, a crime not charged in indictment). People v. Hoffman, 91 Misc. 2d 525 (1977).

Where employee of insurance company who was authorized to draw and sign drafts in settlement of claims, selected inactive claim files and drew drafts payable to claimant, indorsed name of payee on back of draft and took them to collecting bank where he cashed them, where employee was well known to employees of collecting bank as employee of insurance company with authority to sign drafts for his employer, and where collecting bank did not require employee to personally indorse drafts nor produce payee, under UCC § 3-405(1)(b) forged indorsements were "effective," titles to instruments passed as though there had been no forgery, and collecting bank, as good faith transferee was entitled to payment from parties liable on instrument since undisputed facts established that employee was authorized to draw drafts and that he intended payees to have no interest in instruments. General Accident Fire & Life Assurance Corp. v. Citizens Fid. Bank & Trust Co., 519 S.W.2d 817 (Ky. 1975).

In action by insurance company that issued $20,000 check to one of its policy owners whose name had been supplied by employee with intent that owner have no interest in instrument, UCC § 3-405(1)(c) precluded company from recovering face value of check from bank that had paid it in good faith over forged endorsement; bank's alleged negligence in paying check was irrelevant due to conspicuous absence in UCC § 3-405 of requirement that paying or collecting bank exercise ordinary care and fact that draftsmen of UCC consciously allocated such type of loss to employer. Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank, 371 F. Supp. 1002 (E.D. Wis. 1974).

Even though at time checks payable to fictitious company were drawn, assistant treasurer who had caused checks to be drawn was employee of drawer and had supplied drawer with names of fictitious payees, neither check was indorsed "in the name of a named payee," so that indorsements were not effective and collecting bank was not relieved of liability by Code § 3-405(1)(c). Travco Corp. v. Citizens

Fed. Sav. & Loan Ass'n, 42 Mich. App. 291, 201 N.W.2d 675 (1972).

An employee "supplied" to his employer the name of payee intended to have no interest in proceeds of check, thereby making forged endorsement effective as between broker and drawee bank where registered representative of broker initiated normal business practice leading to drawing of check by submitting fraudulent sell order. New Amsterdam Cas. Co. v. First Pa. Banking & Trust Co, 451 F.2d 892 (3d Cir. Pa. 1971).

The drawee bank was not liable for charging a department store's account with checks which its employee had fraudulently caused to be drawn by the store to fictitious suppliers whose endorsements were forged by the employee, for the bank was protected by subsec. (1)(c). May Dep't Stores Co. v. Pittsburgh Nat'l Bank, 374 F.2d 109 (3d Cir. Pa. 1967).

It is not essential that the agent involved in the impostor situation be on the payroll of the drawer as long as the agent is in fact entrusted by the drawer company with taking the information from the drawer's incoming goods department to its bookkeeping department, on the basis of which information the bookkeeping department prepares checks, which it then entrusts to the agent for delivery to the payees, the "agent" supplying false information of goods not actually received and then forging the names of the payees of the checks entrusted to him, for delivery to the payees. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

In a typical "padded payroll" case where an employee causes a check to be issued payable to a real or fictitious person to whom the check is never to be delivered, and the employee keeps the check and "forges" the indorsement required; the loss is placed upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. Pacific Indem. Co. v. Security First Nat'l Bank, 248 Cal. App. 2d 75 (2d Dist. 1967).

If an instrument is made payable to an existing person not intended to have any interest in it, and such fact was known to the person making it so payable or known to his employee, the Legislature intended to make such an instrument bearer paper, thereby relieving a drawee or any endorser from the resulting loss and imposing the loss resulting from actions of a dishonest employee on the drawer-employer. Phoenix Die Casting Co. v. Manufacturers & Traders Trust Co., 50 Misc. 2d 152 (1966).

18. Bond protection.

Banker's blanket bond provided that any check payable to fictitious payee and endorsed in his name was forged indorsement; held, bond provided coverage for loss sustained by bank which honored checks endorsed with payee's name by person other than payee. Delmar Bank v. Fidelity & Deposit Co., 428 F.2d 32 (8th Cir. Mo. 1970).

19. Parol evidence.

Although there is no indication that note signed in lower right corner was signed other than as comaker, parol evidence was admissible to show that note was indeed signed in capacity of surety or accommodation party. Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc., 221 Pa. Super. 89, 288 A.2d 916 (1972).

RESEARCH REFERENCES

ALR. Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

§ 75-3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b), an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person.

SOURCES: Former § 75-3-405: Codes, 1942, § 41A:3-405; Laws, 1966, ch. 316, § 3-405; Laws, 1992, ch. 420, § 43, eff from and after January 1, 1993.

§ 75-3-406. Negligence contributing to forged signature or alteration of instrument.

(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

SOURCES: Former § 75-3-406: Codes, 1942, § 41A:3-406; Laws, 1966, ch. 316, § 3-406; Laws, 1992, ch. 420, § 44, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-406.

11. In general.
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I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-406.

11. In general.

UCC § 3-406 does not make the negligent party liable in tort for damages that result from the alteration. Instead, it estops such party from asserting the alteration against a holder in due course or the drawee. The holder or the drawee is protected by estoppel, and the task of pursuing the wrongdoer is left to the negligent party. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

UCC § 3-406 and § 4-406(2) merely preclude a person who was negligent prior to (UCC § 3-406) or after (UCC § 4-406) a check transaction from asserting an unauthorized signature or alteration against the bank (where customer, instead of asserting unauthorized signature or alteration against bank, sued bank on theory that it had negligently permitted customer's accountant to divert proceeds of checks drawn by customer). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

General pattern of UCC §§ 3-406 and 4-406 is to absolve payor bank, which has been deceived by third party, from liability to its customer if customer's negligence played substantial part in making deception possible; however, bank is absolved from liability only if it has acted with reasonable care or in accordance with reasonable banking standards. Transamerica Ins. Co. v. United States Nat'l Bank, 276 Or. 945, 558 P.2d 328 (1976).

The Code modifies the prior law with respect to the effect of fault of the drawer by adopting as a criterion such negligence as substantially contributes to...the making of an unauthorized signature. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

12. Applicability.

UCC § 3-406 and § 4-406(2) preclude recovery by customer from bank only if bank paid instrument in accordance with reasonable commercial standards (see UCC § 3-406) or ordinary care (see UCC

§ 4-406(3)) (holding that since bank was negligent as a matter of law in paying checks presented by customer's accountant and thereby permitting accountant to divert proceeds of checks to his own use, bank could not claim benefit of either UCC § 3-406 or § 4-406(2)). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

No distinction is made under UCC § 3-406 as to whether the signature which is forged is the signature of the negligent person or not, so that the Code provision has been applied where the drawer was deemed negligent in permitting a situation to arise in which the forger forged an indorsement of the payee's name. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

13. Negligence; substantial contribution.

The question whether a bank was negligent in paying an item-that is, whether it paid the item in accordance with reasonable commercial standards under UCC § 3-406 and § 4-406-is one that must be decided on the facts of each particular case. The reasonableness of the bank's conduct, of course, may be assessed in light of the plaintiff's conduct. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Nowhere does the Uniform commercial Code State in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Where (1) plaintiff lending bank issued cashier's check for $3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through codefendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

Finding of more than ordinary negligence is not necessary under language of UCC § 3-406 before that section operates to preclude recovery on forged indorsement. Commonwealth v. National Bank & Trust Co., 469 Pa. 188, 364 A.2d 1331 (1976).

In action by drawer's assignee against bank to recover amount of nine checks bearing forged indorsements which bank charged to drawer's account, test of conduct amounting to "negligence" within meaning of UCC § 3-406 was whether prudent person in position of drawer's manager, having at his disposal only amount of information and experience manager had concerning purported loan applications, would have foreseen danger of subsequent forgery by automobile dealer and accomplice involved in making purported loans and drawing and issuing checks without conducting credit investigation; if prudent person would have foreseen such danger, then drawer, acting through its manager, could not be said to have properly exercised its duty of ordinary care to bank as required by statute in so making purported loans and in so drawing and issuing checks. Fidelity & Cas. Co. v. Constitution Nat'l Bank, 167 Conn. 478, 356 A.2d 117 (1975).

A customer is precluded from asserting his unauthorized signature against the bank where he has failed to exercise reasonable care. Terry v. Puget Sound Nat'l Bank, 80 Wash. 2d 157, 492 P.2d 534 (1972).

The phrase "substantially contributes" indicates a causal relationship and is the equivalent of the "substantial factor" test applied in the law of negligence generally. Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

14. Proximate cause requirement.

Lax conduct of business affairs or negligent delivery of check by drawer to one not payee will not preclude drawer from asserting forged indorsement, unless lax conduct or negligent delivery proximately caused loss; in instant case, person who drew check payable to existing payee, held not negligent in delivering it to payee's agent who subsequently forged payee's endorsement thereon. Society Nat'l Bank v. Capital Nat'l Bank, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

UCC § 3-406 provision precluding drawer from recovering from bank which cashed check on forged indorsement where drawer's negligence substantially contributes to unauthorized alteration is a change from pre-Code law which required that drawer's negligence must have proximately caused conduct of cashing bank.

Com. v. National Cent. Bank, 94 Dauph. Co. 359 (Pa. 1972).

15. Non-negligent acts.

Where copayee obtained check, drawn to himself and automobile dealer, from drawer-lender, by misrepresenting that he was purchasing automobile, and by forging copayee's indorsement obtained payment from collecting bank, which forwarded check to drawee bank, which paid check to collecting bank and charged drawee's account, but credited drawee's account upon learning of forged indorsement, there was presented no such negligence of drawer, within meaning of § 3-406, as would preclude drawer from asserting forgery against drawee, so that drawer's failure to assert such defense would not preclude drawee bank under § 4-406(5) from prosecuting its claim against collecting bank. East Gadsden Bank v. First City Nat'l Bank, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

In action by holder of forged payroll checks to recover damages from defendant, where defendant's offices were burglarized, blank checks were stolen and imprinted with defendant's check "protectograph," signature of defendant's bookkeeper was forged, and checks were cashed at plaintiff's stores, facts that defendant kept blank checks in unlocked cabinet and that check "protectograph" was in unlocked desk drawer was not sufficient to show that defendant was negligent and that its negligence substantially contributed to making of forgeries under UCC § 3-406; check "protectograph" was not "signature stamp or other automatic signing device" but merely stamped amount of check in manner that made alteration difficult and, although such checks might appear more authentic than usual checks, they still had to be signed by defendant's bookkeeper, whose signature was forged; furthermore, door to defendant's office was locked, as well as its windows and exterior doors to building and, in addition, defendant employed security service to check premises periodically during night. Fred Meyer, Inc. v. Temco Metal Prods. Co., 267 Or. 230, 516 P.2d 80 (1973).

Payee of check was not negligent in following attorney's instructions to endorse check to order of late husband's estate nor in assuming that check would thereafter be deposited in estate account. Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968), aff'd, 105 N.J. Super. 164, 251 A.2d 460 (1969).

The fact that a check is mailed to an attorney by another attorney to obtain a signature does not constitute negligence as there is no reason to foresee that the check will be misappropriated by the client who will then forge the names of the payees thereon. Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

Church whose financial secretary forged checks on its account and was the person to whom cancelled checks and bank statements were required to be sent was not negligent in failing to discover the forgeries where the secretary had been a faithful and trusted member of the church for more than 20 years, and secretary's knowledge of the forgeries could not be imputed to the church. Jackson v. First Nat'l Bank, Inc., 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

16. Preclusion; contributing to unauthorized signature.

Where (1) accountant, who was not authorized to sign checks on behalf of plaintiff corporation or to make deposits into any account other than plaintiff's tax and loan account with defendant bank, presented over a period of time a total of eleven checks to defendant which were signed by plaintiff's president, made payable to defendant, and intended to be deposited into plaintiff's tax and loan account, (2) some of such checks were signed in blank by plaintiff's president and filled in by accountant, which he had authority to do, (3) defendant knew about limitation on accountant's authority, but nevertheless permitted accountant on several occasions to deposit part of a check's proceeds into tax and loan account and remainder into either accountant's personal account or some other account, (4) defendant also allowed accountant to purchase cashier's check with proceeds of one check and to have it made payable to payee designated by accountant, and (5) defendant never required accountant to indorse checks presented or made any inquiry into his authority to use plaintiff's funds in unauthorized manner, court held (1) that defendant had been negligent as a matter of law in dealing with plaintiff's funds, (2) that although Uniform Commercial Code does not expressly state that bank is liable for negligently paying item, bank must nevertheless use ordinary care in disbursing depositor's funds, (3) that reasonableness of defendant bank's conduct could be assessed in light of plaintiff's conduct, (4) that under pre-code rule not displaced by UCC, where check is drawn to order of bank to which drawer is not indebted, bank (a) is authorized to pay proceeds only to persons specified by drawer, (b) takes risk in treating check as payable to bearer, and (c) is placed on inquiry as to authority of drawer's agent to receive payment himself, (5) that if drawer clothes agent with apparent authority to receive proceeds of check made payable to bank's order, bank is not liable to drawer for paying proceeds to agent or applying proceeds in manner specified by agent contrary to his actual authority, (6) that in present case, defendant, as a matter of law, had breached contract implied in normal banking relationship with plaintiff and thus had been negligent in its treatment of plaintiff's funds, (7) that plaintiff had not been aware of defendant's conduct in allowing accountant to divert part of proceeds of plaintiff's checks to accountant's use, (8) that plaintiff had not knowingly assented to defendant's practice of treating checks payable to defendant's order as bearer paper if both drawer and bearer were known to defendant's teller, (9) that defendant's negligence in disbursing plaintiff's funds also could not be successfully defended, either under either UCC § 3-406 (dealing with negligence contributing to alteration or unauthorized signature) or UCC § 4-406 (dealing with customer's duty to discover and report unauthorized signature or alteration), on ground that plaintiff had been negligent in signing some checks in blank and not checking accountant's examination of plaintiff's monthly bank statements, since defendant had been negligent as a matter of law in paying proceeds of checks to accountant, and (10) that UCC § 3-406 and § 4-406(2) and (4) were also inapplicable because plaintiff was not asserting unauthorized signature or alteration against defendant. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Where stock brokerage firm, in dealing with attorney as agent for plaintiff, failed to ascertain or verify the scope of attorney's authority and placed checks in his hands on four separate occasions in 6 months period in violation of its own rules and Rules of New York Stock Exchange and principles of sound and prudent business practices, the firm's conduct was not enough to constitute a "substantial factor" in bringing about the forgery of plaintiff's signature and payment of checks over that unauthorized signature. Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192 (8th Cir. Mo. 1974).

Where blank checks were left in unlocked drawer of barber shop, where plaintiffs never inquired among themselves as to missing check blanks, where plaintiffs did not inquire among themselves or of bank as to unusual absence of statement and cancelled checks, plaintiffs were precluded by their own negligence from recovering from bank which had paid out on checks under skilled forged endorsements. Terry v. Puget Sound Nat'l Bank, 80 Wash. 2d 157, 492 P.2d 534 (1972).

Depositor was negligent as matter of law where she failed to inquire of bank as to lack of receipt of monthly statements and cancelled checks after she was informed that bank's records indicated that she had no money in her account; held, depositor's negligence precluded her from asserting bank's lack of authority to pay allegedly forged checks. Myrick v. National Sav. & Trust Co., 268 A.2d 526 (D.C. 1970).

Where employee fraudulently caused employer to draw checks payable to fictitious suppliers, forged indorsements of fictitious payees, cashed checks at bank, and converted proceeds for which bank charged employer's account, bank was protected in suit by employer for allegedly illegally charging account with amount paid on forged indorsements, by Code § 3-405(1)(c). May Dep't Stores Co. v. Pittsburgh Nat'l Bank, 374 F.2d 109 (3d Cir. Pa. 1967).

Where a buyer of logs follows the practice of making out checks to the order of the suppliers on the basis of delivery slips executed by the hauler bringing the logs to its mill, and allow the hauler to have access to blank forms, and then made out the checks on the basis of such forms without question of their accuracy when in fact the slips showed fictitious deliveries, and the buyer then entrusted the hauler with the checks so that he could deliver them to the payee suppliers, whereupon the hauler forged the names of the latter, there was such negligence on the part of the buyer as to bar it from recovering from the bank on which the checks were drawn. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

Bank which paid forged checks drawn on the trust account of a church payable to the order of the forger, many of which checks bore the endorsement of a company operating a race track, was put on inquiry as to whether the sums represented by the checks were being withdrawn for unauthorized purposes, and was guilty of negligence for failing to inquire. Jackson v. First Nat'l Bank, Inc., 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

Where the drawer of a check caused it to be sent to one bearing the same name as the intended payee and the recipient cashed it at the drawee bank and payment was thereafter stopped by the drawer who subsequently compounded his error by issuing another check in the same amount, sending it again to the same wrong addressee, the drawer was guilty of negligence contributed to the indorsement of the check by an unauthorized party and was required to reimburse the drawee for the sum paid out by it. Park State Bank v. Arena Auto Auction, Inc., 59 Ill. App. 2d 235, 207 N.E.2d 158 (2d Dist. 1965).

17. Reasonable commercial standards.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under

UCC § 4-207(3), since allowance of such fees is discretionary. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where bank which was authorized depositary of plaintiff company failed to investigate authority of plaintiff's manager to treat as his own 17 checks made payable to plaintiff and to deposit such checks in manager's personal account, bank did not follow reasonable commercial standards of banking business so as to be entitled under UCC § 3-406 to assert, in suit by plaintiff for conversion of such checks, defense of plaintiff's allegedly substantial contributory negligence. Mott Grain Co. v. First Nat'l Bank & Trust Co., 259 N.W.2d 667 (N.D. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

Specific act of delivering check to someone who was not payee did not necessarily constitute negligence within meaning of UCC § 3-406 nor could plaintiff's actions in trusting person to whom delivery was made be said to have substantially contributed to subsequent forgery nor did payor-drawee bank pay instrument in accordance with reasonable commercial standards where it was readily apparent that first indorsement was by someone other than named payee. Twellman v. Lindell Trust Co., 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Under UCC § 3-406, insurance company was not precluded from asserting forgery against drawee bank where, on death of its insured, insurance drew check payable to beneficiary of policy and mailed it to insurance broker who forged name of beneficiary, and where check was subsequently paid by drawee bank; sending of check to broker was pursuant to usual practice of giving broker goodwill advantage of delivering check to beneficiary and there was no evidence of prior defalcation by broker or of any prior acts which would have put insurance company on notice of possible misappropriation of funds. Guardian Life Ins. Co. of Am. v. Chemical Bank, 47 A.D.2d 608 (1st Dep't 1975).

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were endorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. West Penn Admin., Inc. v. Union Nat'l Bank, 233 Pa. Super. 311, 335 A.2d 725 (1975).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared no where on instruments; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. Federal Ins. Co. v. Groveland State Bank, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Bank which honored unauthorized indorsements by embezzler of employer's checks could not assert UCC § 3-406 defense of contributory negligence against employer where bank failed to comply with reasonable commercial standards of banking business. Hermetic Refrigeration Co. v. Central Valley Nat'l Bank, Inc., 493 F.2d 476 (9th Cir. Cal. 1974).

In action arising out of "joint pay agreement" between general contractor, subcontractor, and supplier in which bank paid check without endorsement of both payees, under UCC § 3-406 drawer's negligence substantially contributed to improper payment where it failed to advise bank of "joint pay agreement" and failed to draw check so as to make it properly payable to joint payees; nor did bank violate reasonable commercial standards where bank employee who handled transaction made inquiries regarding named payee and received reasonable explanation, there was nothing on face of check to justifiably arouse suspicion, and there was no other irregularity in transaction. Dominion Constr., Inc. v. First Nat'l Bank, 271 Md. 154, 315 A.2d 69 (1974).

Section referred to as example of explicit requirement that party exercise more than "honesty in fact." Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Because of bank's negligence in not insisting on written instructions from depositor before canceling unendorsed treasurer's check and transferring funds to another bank upon instructions contained in letter from person claiming to be agent for depositor, depositor was not precluded in action to recover funds represented by treasurer's check from asserting agent's lack of authority. Taylor v. Equitable Trust Co., 269 Md. 149, 304 A.2d 838 (1973).

Bank is not negligent in exchanging cashier's check made out to named payee for personal check drawn by its customer to same payee bearing unauthorized endorsement; and bank that issued cashier's check may recover against bank that cashes it upon unauthorized endorsement. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Under UCC § 3-406, a negligent depositor is not precluded from asserting a claim if he establishes that the bank's payment of the forged checks was not in accordance with reasonable commercial standards. Exchange Bank & Trust Co. v. Kidwell Constr. Co., 472 S.W.2d 117 (Tex. 1971).

18. Practice and procedure.

Finding that bank had not been negligent in paying checks on which depositor's signature as drawer had been forged by depositor's bookkeeper, and that bank in defending suit by depositor could therefore utilize affirmative defenses afforded by UCC § 3-406 and UCC § 4-406, would not be upset on appeal where such finding was supported by substantial evidence in record. Parsons Travel, Inc. v. Hoag, 18 Wash. App. 588, 570 P.2d 445 (1977).

Contributory negligence of drawer of checks was not defense to cause of action against bank for conversion nor suffice as finding of proximate cause on common law defense of contributory negligence. DoAll Dallas Co. v. Trinity Nat'l Bank, 498 S.W.2d 396 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Jan. 30, 1974).

Bank certified check which had blank spaces and amount thereof could easily be raised; held, bank was "person" and payee of checks was "holder in due course" entitled to recover if bank's negligence substantially contributed to raising of check; summary judgment precluded. Brower v. Franklin Nat'l Bank, 311 F. Supp. 675 (S.D.N.Y. 1970).

Because neither payee nor their attorney was required to anticipate that, as result of escrow mailing, co-payee might appropriate draft and forge endorsements thereon, defense that payee had substantially contributed to making of unauthorized signature was not supported by evidence and should not have been submitted to jury. Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

The Code does not attempt to define what is sufficient negligence to bar a person from claiming that there has been a forgery other than to require that it substantially contributes to the making of an unauthorized signature, and beyond that the question is one to be determined by the trier of fact in each case. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

RESEARCH REFERENCES

ALR. Liability of check printer for errors in identification or routing codes printed on check. 18 A.L.R.4th 923.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

§ 75-3-407. Alteration.

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

SOURCES: Former § 75-3-407: Codes, 1942, § 41A:3-407; Laws, 1966, ch. 316, § 3-407; Laws, 1992, ch. 420, § 45, eff from and after January 1, 1993.

JUDICIAL DECISIONS

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I. DECISIONS UNDER CURRENT LAW.

1.-3. [Reserved for future use].

4. Completion of incomplete instrument.

Bank could not engage in self-help to remedy its mistake of not including Chapter 13 debtor's backhoe as security for note by simply adding the backhoe to the note without notifying the debtor and seeking debtor's ratification; thus, bank did not have security interest in the equipment. Courtney v. Merchants & Mfrs. Bank, 680 So. 2d 866 (Miss. 1996).

5.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-407.

11. In general.

Dates placed on demand note which related to time when interest would be due did not constitute extension of instrument's due date within meaning of UCC § 3-407(1), dealing with material alteration of instruments (stating that demand note, by its very nature, lacks any specified date of maturity and that demand for payment fixes date of maturity). Citizens Bank v. Landers, 570 S.W.2d 756 (Mo. Ct. App. 1978).

Law as to the burden of explaining the alteration of a negotiable instrument was not changed by the provisions of § 3-307 or of § 3-407. In re Abercrombie Estate, 20 Pa. D. & C.2d 496, 9 Fiduc. Rep. 539 (1960).

12. Physical alteration requirement.

Claim in suit to cancel combination note, security agreement, and disclosure statement, which alleged that amount not agreed on was fraudulently inserted in note signed in blank, raised issue that was primarily controlled by UCC § 3-115, which deals with incomplete instruments, and UCC § 3-407, which deals with alteration of instruments. First Am. Bank v. Bishop, 239 Ga. 809, 239 S.E.2d 19 (1977).

Where loan application spelled out what part of $80,000 loan would be for stock in cooperative lending association and what part for fees, loan of $60,000 plus amount necessary for fees did not constitute material alteration in terms of obligation imposed upon comakers on face of note, allegedly because note was unconditional on its face, while comakers were held accountable for stock purchases and additional loan fees. Turfers, Inc. v. Frederick Prod. Credit Ass'n, 265 Md. 679, 291 A.2d 643 (1972).

13. Materiality; number or relation of parties.

Striking name of copayee-bank from notes was not material or fraudulent alteration and notes might be enforced by holder as altered without joinder of bank. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

14. Completion of incomplete instrument.

Where parties to security agreement indicated their intent that paragraph covering debtor's inventory was to be applicable by including under this printed paragraph typewritten statement, "all petroleum products, tires and other motor vehicle supplies, now owned or after-acquired," secured party's alteration of instrument by insertion of "x" in box prefacing paragraph showing coverage of debtor's inventory was authorized. First Nat'l Bank v. Hull, 189 Neb. 581, 204 N.W.2d 90 (1973).

Seller does not have authority to sign purchaser's name to altered contract under UCC § 3-407, even where purpose of alteration is to give purchaser benefit of lower interest rate and lower monthly payments. T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months prior to maturity date "as authorized" was premature. Bank of New Effington v. Thompson, 502 P.2d 978 (Colo. Ct. App. 1972).

Check was legally complete when certified even though there were spaces on check making alteration by forger possible; held, certifying bank was not liable to payee for raised amount of check. Wallach Sons v. Bankers Trust Co., 62 Misc. 2d 19 (1970).

Where the makers of a note, who were inexperienced in even ordinary business affairs, were induced by a salesman to enter into a home improvement contract supposedly with one business concern but without notice to, or consent of, the makers, and after the signing thereof, the name of the concern with whom makers intended to deal was clipped from one copy of the contract and the name of another concern stamped thereon, and makers innocently signed a property loan application in blank, the makers were entitled to the benefit of the rules governing incomplete instruments and alteration of instruments. Fidelity Trust Co. v. Gardiner, 191 Pa. Super. 17, 155 A.2d 405 (1959).

15. Writing as signed.

In suit on promissory note, payee's addition to note of acknowledgment of signature of maker and notarization thereof was not material alteration within meaning of UCC § 3-407(1) since it did not change contract of parties, materially affect form of document, time of payment, or sum payable; furthermore, there was no showing that payee acted fraudulently so as to discharge maker under UCC § 3-407(2); rather, addition was ineffectual attempt by payee to acquire security for debt. Thomas v. Osborn, 13 Wash. App. 371, 536 P.2d 8, 88 A.L.R.3d 898 (1975).

Where "at 6%" is added after the words "with interest" there is no material change to the instrument when that is the rate which is applied without such additional notation. Epstein v. Paskow & Epstein, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

Insertion of word "at" in note before printed name of bank, where insertion did not add place of payment but merely repeated effect of words "at its banking house" already and otherwise contained in note, was not material alteration. Holliday v. Anderson, 428 S.W.2d 479 (Tex. Civ. App. 1968).

There is no alteration where the final payment due on a note is changed from $41,000.00 to $42,000.00 where the balance of the note showed that this was the correct amount and that the changed figure had been merely an arithmetical mistake. National State Bank v. Kleinberg, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

This section is not applicable unless the alteration made by the holder of a note was fraudulent, and where the alterations consisted of striking out the amount of the note and inserting in pencil a lesser figure, which was the balance remaining after a payment was made and was the amount for which judgment was entered for the holder, and of a red line drawn across the face of the note to indicate that it had been examined by a bank examiner, they were immaterial and did not serve to discharge the makers. Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967).

Where by endorsement the makers of a promissory note confessed judgment in favor of the payee, and the note was subsequently altered to include confession of judgment in favor of an assignee, such an alteration was not material in that it did not in any way change the obligation of the makers to pay the note, nor did it adversely affect the assignee's rights as a holder in due course. Navitsky v. Gregas, 39 Pa. D. & C.2d 143 (1966).

Where a promissory note in the body thereof provided a due date, and in the upper left hand corner but not in the body of the note, had a box filled out "due 12/21/63" and this date had been marked through in ink and above the box was written in ink "Nov. 15, 1964", such alleged alteration is not material as it did not affect the contract in any manner. M.B. Dale, Inc. v. Dawson County Bank, 112 Ga. App. 560, 145 S.E.2d 619 (1965).

16. Discharge.

For a discharge to occur, there must be an alteration by the holder of the note, which is both fraudulent and material. New Britain Nat'l Bank v. Baugh, 31 A.D.2d 898 (1st Dep't 1969).

17. —Fraud requirement.

Where a note, as executed, contained a clause granting the maker an option for an extension on the instrument, and where the holder, on receiving such note, lined through the extension option, such change was a material change in the instrument under UCC § 3-407(1)(c). However, since UCC § 3-407(2) provides that the only material change that discharges any party to the instrument is a change that is also fraudulent, the question as to whether the holder's lining out the extension option was a fraudulent alteration was one of fact for the jury and precluded the granting of summary judgment in favor of the note's guarantor. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Contention of maker of note that change by holder of place of payment of instrument was material alteration that, by itself, discharged maker from liability was untenable, since UCC § 3-407(2)(a) provides that for alteration of instrument to discharge maker, alteration must be both material and fraudulent. Central State Bank v. Powar & Ferraioli Enters., Ltd., 90 Misc. 2d 457 (1977).

There is no "alteration" because there is no fraud when a pencil line is run through the amount of the note after part payment has been made and the then current balance is written in pencil or where a red line is drawn across the face of the note to indicate that the bank examiner had examined the note. Bank of N.M. v. Rice, 78 N.M. 170, 429 P.2d 368 (1967).

In the absence of a showing of fraud a material alteration does not void a promissory note. Van Norden v. Auto Credit Co., 109 Ga. App. 208, 135 S.E.2d 477 (1964).

18. —Ratification.

In action for recovery of mobile home covered by retail instalment contract, even assuming contract had been altered subsequent to its execution, payment by buyers subsequent to receipt of "altered" contract constituted ratification under UCC § 3-407. Morrissette v. Commercial Credit Corp., 345 So. 2d 298 (Ala. Civ. App. 1977).

19. Rights of holder in due course.

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defendant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

Where at the time a note was negotiated to a bank it was overdue as originally drafted, the bank might still claim the status of a holder in due course and enforce the note if it came to the bank in such a condition that the alteration of the maturity date was not noticeable. Unadilla Nat'l Bank v. McQueer, 27 A.D.2d 778 (3d Dep't 1967).

A payee may be a holder in due course even though the note was incomplete as to amount when signed, and where the blanks are filled in and an otherwise incomplete instrument is completed, the loss is placed upon the party who left the instrument incomplete and permitted the holder to enforce it in its completed form. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The fact that an instrument is incomplete when signed does not prevent a holder from being a holder in due course and such holder may enforce the instrument according to its completed terms. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

A material alteration of a promissory note is no defense against a holder in due course seeking to enforce an incomplete instrument as completed, where the alleged alteration was the filling in of the blanks in the instruments after the makers had signed it. First Nat'l Bank v. Anderson, 7 Pa. D. & C.2d 661 (1956).

20. Liability of bank; risk of alteration.

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn. Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

Holder of check who procures certification warrants to bank that check has not been materially altered, although bank runs risk of loss if check is certified after alteration and then passes to holder in due course, under Code § 3-417. Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

21. Practice and procedure.

Change of date of demand note executed by partnership, which had been indorsed by all eight partners as individuals on date of instrument's execution, from November 11, 1971 to March 27, 1973 at instance of bank which advanced funds represented by note did not constitute material alteration of instrument under UCC § 3-407(1)(c), even though only two of the eight indorsers were aware of and consented to such change of date, where suit on instrument was commenced within three years of date originally placed thereon and nonconsenting indorsers would therefore not have been able to interpose plea of limitations even if original date had not been changed (stating that court's opinion did not reach question whether such change of date would have been material if action had been commenced more than three years after date originally placed on instrument). Placido v. Citizens Bank & Trust Co., 38 Md. App. 33, 379 A.2d 773 (1977).

Granting of summary judgment in favor of creditor bank on promissory notes executed by principal of defendant guarantors was not error, as against defendants' contention that notes had been materially altered by bank within meaning of UCC § 3-407(1), where (1) evidence introduced by bank, including notes themselves, showed only that bank officials had made certain administrative notations on back of notes for bank's use only, (2) such notations did not change contract of any party to instruments in any respect, and (3) defendants in their turn failed to introduce any evidence which showed that factual dispute existed on issue of alteration. Johnson v. First Nat'l Bank, 143 Ga. App. 384, 238 S.E.2d 747 (1977).

Notwithstanding that promissory note was materially altered, promisor was not discharged under UCC § 3-407 where no issue was requested or submitted to jury as to who altered the note and where promisor failed to establish, in face of conflicting testimony, to jury's satisfaction that intent existed to defraud promisor. Lawler v. FDIC, 538 S.W.2d 245 (Tex. Civ. App. 1976), ref. n.r.e (Dec. 1, 1976).

UCC § 3-407 relating to alteration could not justify the instruction that "Defendants had a legal right to alter the original installment purchase contract executed by the Plaintiff to give the Plaintiff the benefit of a lower interest rate and of lower monthly payments, if such alteration was not made for a fraudulent purpose"; such instruction was erroneous. T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972).

Alleged addition to signature on note of words "Fidelity Enterprises, Incorporated, D/B/A" was material alteration or change raising questions of fact with regard to fraudulent or non-fraudulent nature of alteration, precluding summary judgment for bank in action against guarantor on promissory note. Peppers v. Citizens & S. Nat'l Bank, 127 Ga. App. 16, 192 S.E.2d 409 (1972).

Where blank logging slips, similar to blank checks were readily available to employees and two pads of such slips were given to employee charged with forgery, there was sufficient evidence to support finding of employer's negligence "substantially contributing" to alleged forgery. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

When a note is signed in blank it becomes a question of fact whether the instrument was filled in in accordance with the authorization of the makers. Golden Dawn Foods, Inc. v. Cekuta, 1 Ohio App. 2d 464, 205 N.E.2d 121 (1964).

III. DECISIONS UNDER FORMER STATUTES.

22. Decisions under former Code 1942 § 165.

A plea of alteration after execution is an affirmative defense which defendant has the burden of proving by clear and convincing evidence. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

Where a note is payable with interest, insertion by the payee of the legal rate after its execution, does not vitiate it. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

That the rate of interest was inserted on a different typewriter than was used in filling other blanks in a note, is insufficient to show that it was subsequent to its execution. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. Garnett v. Associates Disct. Corp., 233 Miss. 849, 103 So. 2d 368 (1958).

Holder in due course of instrument which has been materially altered may recover according to its original tenor. Gibbons v. Longino & Reid, 153 Miss. 749, 121 So. 490 (1929).

Holder in due course of note, materially altered by blank date of payment being filled in, can recover on it according to original tenor. Wilson v. Stark, 146 Miss. 498, 112 So. 390 (1927).

23. Decisions under former Code 1942 § 166.

Where defendant alleges and has the burden of proving an alteration vitiating an instrument, he must establish both the fact of alteration and its vitiating character. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

A maker's oral statement denied by the payee, that blank spaces for rate of interest were not filled in when he executed notes in suit, are not sufficient to make a jury issue. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

Where the trial court was warranted in finding that the name of the payee in two demand notes sued upon had been changed by the indorser at the instance of the indorsee and without the consent of one of the makers, this was a material alteration and voided the instrument insofar as such maker was concerned, but a different rule applied as to the indorser. Boxwell v. Champagne, 229 Miss. 355, 91 So. 2d 256 (1956).

The guarantor is released or discharged of liability if, without his consent, the contract of obligation by which the principal therefore is bound to the creditor or obligee has been materially altered in respect of its terms or the manner of execution thereof. Tower Underwriters v. Culley, 211 Miss. 788, 53 So. 2d 94 (1951).

Where there was a contract for operation of a loan business, under which the claimant guaranteed all loans made by the agency and notes were payable at a certain office, the removal of the broker with whom claimant had such contract, after discovery of shortages, to another location with all the records without claimant's consent, relieved the claimant from any liabilities of guarantor because the contract was materially altered by change of place of payment. Tower Underwriters v. Culley, 211 Miss. 788, 53 So. 2d 94 (1951).

§ 75-3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

SOURCES: Former § 75-3-408: Codes, 1942, § 41A:3-408; Laws, 1966, ch. 316, § 3-408; Laws, 1992, ch. 420, § 46, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-409.

11. In general.
12. Check as promise of future payment.
13. Revocation; stop payment order.
14. —Applicability to bank money order.
15. Drawee's liability; acceptance.
16. Liability under other obligation.
17. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions under former Code 1942 § 168.
19. Decisions under former Code 1942 § 230.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-409.

11. In general.

Under UCC § 3-409, check or draft does not operate as assignment of any funds; basic reason for rule is to permit unaccepting drawee to avoid disputes with other than drawer; statement on check that funds are payable at bank does not create obligation on part of drawee to pay check. Atlantic Cement Co. v. South Shore Bank, 730 F.2d 831 (1st Cir. Mass. 1984).

The provisions of subsection (1) of the instant section are in line with § 189 of the old Negotiable Instruments Act of 1901. Commonwealth v. Cohen, 203 Pa. Super. 34, 199 A.2d 139 (1964), cert. denied, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), cert. denied, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

12. Check as promise of future payment.

Issuance of check to auto repairman did not operate as assignment of funds and did not extinguish mechanics lien; underlying obligation was resurrected upon dishonor of draft. Leavitt v. Charles R. Hearn, Inc., 19 Ill. App. 3d 980, 312 N.E.2d 806 (1st Dist. 1974).

Where the parties have not, by agreement, made an assignment of funds by the issuance of a check, a garnishment served on the drawee bank before the check is presented for payment gives priority to the garnishment. State Bank v. Stallings, 19 Utah 2d 146, 427 P.2d 744 (1967).

A check can be a negotiable instrument without constituting immediate payment, and unless the parties agree otherwise, a check is not payment until presented and paid. Kensil v. Ocean City, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

13. Revocation; stop payment order.

Payee had no interest in cashier's check which had been typed and signed but which was cancelled when bank learned that drawer company was being placed in bankruptcy since, under UCC § 3-409, check itself did not operate as assignment of funds and payee, who never took possession of check, could not qualify as holder under UCC § 1-201(2). Rex Smith Propane, Inc. v. National Bank of Commerce, 372 F. Supp. 499 (N.D. Tex. 1974).

Receipt of check which was to be applied on note owed by corporation and indorsed by stockholder did not of itself operate as assignment of funds in hands of drawee bank and therefore was conditional payment only, which became nullity when payment was stopped, and did not relieve indorsee from liability on note, notwithstanding fact that bank had assured him that amount of check had been paid on note. Del State Bank v. Patton, 513 P.2d 868 (Okla. 1973).

A check does not of itself operate as an assignment of any part of the drawer's funds deposited with the bank upon which it is drawn, but is merely an order upon a bank to pay from the drawer's account, and it may be revoked at any time prior to certification, acceptance or payment. Lambeth v. Lewis, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

14. —Applicability to bank money order.

A bank money order which does not require the signature of the issuer is subject to a stop-payment order. Krom v. Chemical Bank N.Y. Trust Co., 38 A.D.2d 871 (3d Dep't 1972).

Money orders purchased from bank which, when issued, had the amount written on them, but were blank as to date, payee and name and address of maker, and which had printed thereon the bank's name and address, were subject to stop-payment order. Krom v. Chemical Bank N.Y. Trust Co., 38 A.D.2d 871 (3d Dep't 1972).

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

15. Drawee's liability; acceptance.

UCC § 3-409(1) means that until a check drawn on a bank is accepted, the bank is not liable thereon. Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient funds). Groos Nat'l Bank v. Shaw's of San Antonio, Inc., 555 S.W.2d 492 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Jan. 18, 1978).

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. Clinger v. Clinger, 503 P.2d 363 (Colo. Ct. App. 1972).

Only drawer bank is liable on bank draft until accepted by drawee; although cashier's check is accepted upon issuance there is only one bank involved and therefore only one party bound, as compared with certified check on which both drawer and drawee are bound. Perry v. West, 110 N.H. 351, 266 A.2d 849 (1970).

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st

Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

16. Liability under other obligation.

The fact that a check is not an assignment and does not impose liability on the drawee until it is accepted, does not preclude the liability of the bank for failing to honor its obligation to disperse building funds held by it in escrow. Mid-Continent Cas. Co. v. Jenkins, 431 P.2d 349 (Okla. 1967).

17. Practice and procedure.

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. North Valley Bank v. National Bank, 437 F. Supp. 70 (N.D. Ill. 1977).

Payee could not bring action to recover amount of check from drawee bank, where any claim with respect to setoff by drawee bank against balance in bankrupt drawer's checking account belonged to bankrupt's estate on behalf of all creditors, not just payee of check. Dube v. Manufacturers Hanover Trust Co., 39 A.D.2d 684 (1st Dep't 1972), aff'd, 33 N.Y.2d 739, 349 N.Y.S.2d 1001, 304 N.E.2d 569 (1973).

Since draft is not assignment under UCC § 3-409(1), check held by payee and drawn by bankrupt was subject to drawee bank's setoff rights. Dube v. Manufacturers Hanover Trust Co., 39 A.D.2d 684 (1st Dep't 1972), aff'd, 33 N.Y.2d 739, 349 N.Y.S.2d 1001, 304 N.E.2d 569 (1973).

Where drawee bank had not accepted check either voluntarily or involuntarily, it was entitled, without incurring liability to payee, to set off matured indebtedness against funds in drawer's account. Conn v. Bank of Clarendon Hills, 53 Ill. 2d 33, 289 N.E.2d 425 (1972).

The statute of limitations does not run from the time of delivery of the check but begins to run at the time the check is presented for cashing; or if not presented promptly, within a reasonable time after the delivery of the check, whichever occurs first. Commonwealth v. Cohen, 203 Pa. Super. 34, 199 A.2d 139 (1964), cert. denied, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), cert. denied, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

The two-year statute of limitations applicable to a conspiracy prosecution in which the cashing of a check was an overt act did not begin to run from the time of the delivery of the check but began to run at the time the check was presented for cashing, and prosecution was not barred where an indictment charging the offense was returned within two years of the time the check was cashed. Commonwealth v. Cohen, 203 Pa. Super. 34, 199 A.2d 139 (1964), cert. denied, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), cert. denied, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions under former Code 1942 § 168.

Drafts do not, of themselves, operate as an assignment of funds of a drawee in the hands of the bank and as result the bank therefore could not pay them until they were accepted by the drawee even though the bank had prepared a check for delivery to the forwarding bank, if there should be acceptance. Thack v. First Nat'l Bank & Trust Co., 206 F.2d 180, 39 A.L.R.2d 1290 (5th Cir. 1953).

19. Decisions under former Code 1942 § 230.

Check, returned to payee bank by drawee bank's correspondent bank after receiving notice of drawee bank's liquidation, held not paid when presented at clearing house, so that drawer could not recover amount thereof from correspondent bank. Campbell v. Love, 168 Miss. 75, 150 So. 780 (1933).

There is no assignment pro tanto, where check is not drawn on particular fund or does not show on face it is assignment of particular fund. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Check not assignment of maker's funds in bank. Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584 (1919).

§ 75-3-409. Acceptance of draft; certified check.

(a) "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

SOURCES: Former § 75-3-409: Codes, 1942, § 41A:3-409; Laws, 1966, ch. 316, § 3-409; Laws, 1992, ch. 420, § 47, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.
12. Certification as acceptance.
13. Issuance of instrument as acceptance.
14. —Effect on subsequent attempts to stop payment.
15. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under former Code 1942 § 173.
17. Decisions under former Code 1942 § 202.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient funds). Groos Nat'l Bank v. Shaw's of San

Antonio, Inc., 555 S.W.2d 492 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Jan. 18, 1978).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Requirements for acceptance as set forth in UCC § 3-410 are fulfilled by affixing of signature by agent of issuing bank. National Newark & Essex Bank v. Giordano, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

The acceptance of a check must be in writing, and purported acceptance by means of a telephone conversation is invalid. Georgia Bank & Trust Co. v. Hadarits, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

12. Certification as acceptance.

Where (1) buyer tendered check to seller for less than amount due and attached statement to check which (a) showed reason for deduction from amount owed, and (b) stated that check constituted "payment in full," (2) seller took check, but told buyer that he was not taking it as payment in full, and (3) seller subsequently had check certified, court held that seller had accepted check in full payment of buyer's debt, inasmuch as (1) under UCC § 3-411(1), certification of check constituted acceptance thereof, and (2) such certification is equivalent of collecting or cashing check, in that check's amount is thus placed under creditor's exclusive control and debtor is completely deprived of his money with no right to stop payment on check. Sherwin-Williams Co. v. Sarrett, 419 So. 2d 1332, 42 A.L.R.4th 89 (Miss. 1982).

A creditor's certification of a debtor's checks constituted acceptance thereof within the meaning of § 75-3-411(1) and operated as an accord and satisfaction of the debt, where the creditor certified such checks with full knowledge of statements on the checks listing deductions and stating that the amounts tendered constituted payment in full of the amounts due. Sherwin-Williams Co. v. Sarrett, 419 So. 2d 1332, 42 A.L.R.4th 89 (Miss. 1982).

Under UCC § 3-411(1), certification of check is acceptance by drawee but § 3-411(1) did not apply where payee of check procured its certification. Post Rd. Realty, Inc. v. Zee-Bar, Inc., 117 N.H. 136, 370 A.2d 282 (1977).

Where lessor received check from lessee which stated, on reverse side, that acceptance and endorsement of check constituted full and final settlement of any obligation by lessee to lessor under lease agreement, and where lessor had check certified by issuing bank, act of having check certified constituted acceptance of payment under terms specified on check and lessee was released from further obligation to lessor notwithstanding lessor did not endorse check. Kersh v. Manis Whsle. Co., 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Argument that since certification constituted acceptance under § 3-411, drawer was discharged from any further liability with respect to payment of underlying obligation, and trial court therefore erred in awarding interest on amount of check was without merit where, because of restriction on check that indorsement would amount to acknowledgment that check was in full payment of all claims, payee could not cash check but could only obtain certification. August Bohl Contracting Co. v. Depot Constr. Corp., 42 A.D.2d 812 (3d Dep't 1973).

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. Clinger v. Clinger, 503 P.2d 363 (Colo. Ct. App. 1972).

13. Issuance of instrument as acceptance.

A cashier's check is a draft drawn by a bank, and under UCC § 3-410(1), it is deemed to have been accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

A note, unlike a draft, is not covered by UCC § 3-410(1) and cannot be deemed to have been accepted by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. Thompson Poultry, Inc. v. First Nat'l Bank, 199 Neb. 8, 255 N.W.2d 856 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976).

14. —Effect on subsequent attempts to stop payment.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer, (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued to repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn. Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

15. Other matters.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047 (2d Cir. N.Y. 1979).

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. North Valley Bank v. National Bank, 437 F. Supp. 70 (N.D. Ill. 1977).

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. Jefferies & Co. v. Arkus-Duntov, 357 F. Supp. 1206 (S.D.N.Y. 1973).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. Maintenance Serv., Inc. v. Royal Nat'l Bank, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

Prior to its acceptance by the drawee bank a check in the possession of the payee is subject to garnishment under Wisconsin law. Skalecki v. Frederick, 31 Wis. 2d 496, 143 N.W.2d 520 (1966).

The words "upon acceptance" in a draft or bill of exchange do not render the instrument conditional, since presentment for acceptance may be required for any check or bill of exchange. Merson v. Sun Ins. Co., 44 Misc. 2d 131 (1964).

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under former Code 1942 § 173.

Bank's payment of check on unauthorized indorsement and charging it to drawer does not constitute acceptance. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

17. Decisions under former Code 1942 § 202.

Chattel mortgagee who was prevented by illness from presenting check of mortgagor until garnishment proceedings against bank prevented its payment, held not precluded from foreclosing mortgage. Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584 (1919).

RESEARCH REFERENCES

ALR. Provision in draft or note directing payment "on acceptance" as affecting negotiability. 19 A.L.R.4th 1268.

Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

§ 75-3-410. Acceptance varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and indorser that does not expressly assent to the acceptance is discharged.

SOURCES: Former § 75-3-410: Codes, 1942, § 41A:3-410; Laws, 1966, ch. 316, § 3-410; Laws, 1992, ch. 420, § 48, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-412.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-412.

11. In general.

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and since during interim depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account, under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

In action by plaintiff to recover against two collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

§ 75-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.

(a) In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check, (ii) stops payment of a teller's check, or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) are not recoverable if the refusal of the obligated bank to pay occurs because (i) the bank suspends payments, (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (iv) payment is prohibited by law.

SOURCES: Former § 75-3-411: Codes, 1942, § 41A:3-411; Laws, 1966, ch. 316, § 3-411; Laws, 1992, ch. 420, § 49, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.
12. Certification as acceptance.
13. Issuance of instrument as acceptance.
14. —Effect on subsequent attempts to stop payment.
15. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under former Code 1942 § 173.

17. Decisions under former Code 1942 § 202.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient funds). Groos Nat'l Bank v. Shaw's of San Antonio, Inc., 555 S.W.2d 492 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Jan. 18, 1978).

Requirements for acceptance as set forth in UCC § 3-410 are fulfilled by affixing of signature by agent of issuing bank. National Newark & Essex Bank v. Giordano, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

The acceptance of a check must be in writing, and purported acceptance by means of a telephone conversation is invalid. Georgia Bank & Trust Co. v. Hadarits, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

12. Certification as acceptance.

Under UCC § 3-411(1), certification of check is acceptance by drawee but § 3-411(1) did not apply where payee of check procured its certification. Post Rd. Realty, Inc. v. Zee-Bar, Inc., 117 N.H. 136, 370 A.2d 282 (1977).

Where lessor received check from lessee which stated, on reverse side, that acceptance and endorsement of check constituted full and final settlement of any obligation by lessee to lessor under lease agreement, and where lessor had check certified by issuing bank, act of having check certified constituted acceptance of payment under terms specified on check and lessee was released from further obligation to lessor notwithstanding lessor did not endorse check. Kersh v. Manis Whsle. Co., 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Argument that since certification constituted acceptance under § 3-411, drawer was discharged from any further liability with respect to payment of underlying obligation, and trial court therefore erred in awarding interest on amount of check was without merit where, because of restriction on check that indorsement would amount to acknowledgment that check was in full payment of all claims, payee could not cash check but could only obtain certification. August Bohl Contracting Co. v. Depot Constr. Corp., 42 A.D.2d 812 (3d Dep't 1973).

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. Clinger v. Clinger, 503 P.2d 363 (Colo. Ct. App. 1972).

13. Issuance of instrument as acceptance.

A cashier's check is a draft drawn by a bank, and under UCC § 3-410(1), it is deemed to have been accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

A note, unlike a draft, is not covered by UCC § 3-410(1) and cannot be deemed to have been accepted by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. Thompson Poultry, Inc. v. First Nat'l Bank, 199 Neb. 8, 255 N.W.2d 856 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976).

14. —Effect on subsequent attempts to stop payment.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer, (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued to repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn. Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

15. Other matters.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047 (2d Cir. N.Y. 1979).

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. North Valley Bank v. National Bank, 437 F. Supp. 70 (N.D. Ill. 1977).

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. Jefferies & Co. v. Arkus-Duntov, 357 F. Supp. 1206 (S.D.N.Y. 1973).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. Maintenance Serv., Inc. v. Royal Nat'l Bank, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

Prior to its acceptance by the drawee bank a check in the possession of the payee is subject to garnishment under Wisconsin law. Skalecki v. Frederick, 31 Wis. 2d 496, 143 N.W.2d 520 (1966).

The words "upon acceptance" in a draft or bill of exchange do not render the instrument conditional, since presentment for acceptance may be required for any check or bill of exchange. Merson v. Sun Ins. Co., 44 Misc. 2d 131 (1964).

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under former Code 1942 § 173.

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Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

17. Decisions under former Code 1942 § 202.

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RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

§ 75-3-412. Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under Section 75-3-415.

SOURCES: Former § 75-4-412: Codes, 1942, § 41A:3-412; Laws, 1966, ch. 316, § 3-412; Laws, 1992, ch. 420, § 50, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

In a case involving a dispute over loans for three trucks, a borrower's liability as the maker was unconditional under Miss. Code Ann. § 75-3-412; therefore, a trial court erred by entering a partial equitable judgment in his favor when it determined that he was not responsible for the balance of a loan that was still outstanding based on a car dealer's fraud. Trustmark Nat'l Bank v. Barnard, 930 So. 2d 1281 (Miss. Ct. App. 2006).

Maker of note is obligated to pay same and agreement by grantee of mortgaged premises to assume and pay mortgage debt does not release grantor-mortgagor of mortgaged premises from liability as maker and maker's status as principal on note is not affected. West Point Corp. v.

New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

Under UCC § 3-413(1), a promissory note is an unconditional contract of the maker to pay the holder according to the tenor of the instrument. Since the note is an unconditional promise, the contract is complete as written, and parole evidence may not be used to impose conditions that are not apparent on the face of the instrument. For example, an oral agreement between the parties, made contemporaneously with the execution of the note or prior thereto, which relates to a condition not expressed in the note itself, is incompetent to change the contract as represented on the face of the note (where guarantor of note alleged that payee had not obtained another person's signature to note and also had not obtained title to certain automobiles which were to be security for defendant's guaranty). Whiteside v. Douglas County Bank, 145 Ga. App. 775, 245 S.E.2d 2 (1978).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976).

Where automobile dealer owed insurance agent $10,000 and gave check to agent for $5,000 in partial satisfaction of debt, transaction did not alter fact that dealer was still indebted to agent for $10,000; under UCC § 3-413(1), it simply changed form of part of debt and check was evidence that maker of check was indebted to payee in amount of $5,000. Chrysler Credit Corp. v. Malone, 502 S.W.2d 910 (Tex. Civ. App. 1973).

§ 75-3-413. Obligation of acceptor.

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under Section 75-3-414 or 75-3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

SOURCES: Former § 75-3-413: Codes, 1942, § 41A:3-413; Laws, 1966, ch. 316, § 3-413; Laws, 1992, ch. 420, § 51, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. Clinger v. Clinger, 503 P.2d 363 (Colo. Ct. App. 1972).

RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:581 et seq. (contract obligations of parties; acceptor).

§ 75-3-414. Obligation of drawer.

(a) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Section 75-3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under Section 75-3-415(a) and (c).

(e) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) is not effective if the draft is a check.

(f) If (i) a check is not presented for payment or given to a depositary bank for collection within thirty (30) days after its date, (ii) the drawee suspends payments after expiration of the 30-day period without paying the check, and (iii) because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

SOURCES: Former § 75-3-414: Codes, 1942, § 41A:3-414; Laws, 1966, ch. 316, § 3-414; Laws, 1992, ch. 420, § 52, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. GMAC v. General Accident Fire & Life Assurance Corp., 67 A.D.2d 316 (4th Dep't 1979).

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited check in his account at plaintiff depositary bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time, court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and (c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depositary bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. Frantz v. First Nat'l Bank, 584 P.2d 1125 (Alaska 1978).

Lack of acceptance by drawee bank was not defense to action by payee against drawer to recover on dishonored draft, since UCC § 3-507 gave holder immediate right of recourse against drawer upon drawee's refusal to accept draft and since drawer engaged under UCC § 3-413 to pay draft upon dishonor. Baum v. Cotton States Mut. Ins. Co., 141 Ga. App. 636, 234 S.E.2d 178 (1977).

Notwithstanding checks clearly named corporation represented, were drawn on corporate account, and each check was stamped with corporation's "check protector," corporate officer who signed checks was personally liable under UCC §§ 3-403 and 3-413 to payee upon checks' dishonor where, inter alia, checks did not reveal capacity in which officer signed checks and payee's testimony indicated that he was not aware of signer's representative capacity when he received checks in payment for his work as subcontractor. Griffin v. Ellinger, 538 S.W.2d 97, 97 A.L.R.3d 791 (Tex. 1976).

Where depositary bank, as holder of check which defendant drew in favor of bank's depositor and then stopped payment thereon, brought suit on drawer's contract under UCC § 3-413(2), "defenses" which drawer was entitled to assert under UCC § 3-306(b) included only those defenses connected with instrument itself, and did not include setoff based on separate and distinct transactions between drawer and original payee. Bank of Wyandotte v. Woodrow, 394 F. Supp. 550 (W.D. Mo. 1975).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. Chicago Title & Trust Co. v. Walsh, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

As holder in due course of check upon which payment was later stopped, bank had right to recover from drawer amount withdrawn from account opened by deposit of check. People v. Lombardi, 13 Ill. App. 3d 754, 301 N.E.2d 70 (1st Dist. 1973).

The drawee is entitled to accept the date of the check as true where there is nothing to indicate the contrary since the date on an instrument is "presumed to be correct." Newman v. Manufacturers Nat'l Bank, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account, and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

§ 75-3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), and (d) and to Section 75-3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.

(c) If notice of dishonor of an instrument is required by Section 75-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) is discharged.

SOURCES: Former § 75-3-415: Codes, 1942, § 41A:3-415; Laws, 1966, ch. 316, § 3-415; Laws, 1992, ch. 420, § 53; Laws, 2010, ch. 506, § 20, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-414.

11. In general; indorser's obligation to pay.
12. —Dishonor.
13. Discharge from liability.
14. Drawing without recourse.
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16. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

17. Decisions under former Code 1942 § 79.
18. Decisions under former Code 1942 § 107.
19. Decisions under former Code 1942 § 108.
20. Decisions under former Code 1942 § 109.
21. Decisions under former Code 1942 § 233.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-414.

11. In general; indorser's obligation to pay.

Under UCC § 3-414(1), one who indorses a check warrants that on dishonor of the instrument and relevant notice thereof, he will pay the instrument according to its tenor at the time of his indorsement. Consequently, dishonor and notice of dishonor are prerequisites to an indorser's liability. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Where decedent signed two promissory notes either as co-maker or endorser, both notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death, two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

Under UCC § 3-414(1), accommodation party, by indorsing check drawn by another, agrees that on dishonor of check and any necessary notice of dishonor and protest, she will pay instrument according to its tenor at time of her indorsement. Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). First New Haven Nat'l Bank v. Clarke, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. Hall v. Security Planning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

There is no requirement that holder of promissory note attempt to collect against collateral before proceeding against indorsers or maker. Hurt v. Citizens Trust Co., 128 Ga. App. 224, 196 S.E.2d 349 (1973).

Indorsement of notes "with recourse" created legal liability to discharge obligation of notes according to tenor. Laukhuf v. Associates Disct. Corp., 443 S.W.2d 725 (Tex. Civ. App. 1969).

Where note provided for payment of attorneys fees, indorsers of note assumed this obligation, and trial court was bound to ascertain such fees. Wiener v. Van Winkle, 273 Cal. App. 2d 774 (2d Dist. 1969).

In a case where it was determined that indorsers upon a note given by a conditional buyer to a conditional seller were not discharged by the seller's assent to an assignment for benefit of creditors by the buyer nor by the seller's repossession and sale of the property, it was said that the liability of the indorsers was governed by subsection (i) of this section. Priggen Steel Bldgs. Co. v. Parsons, 350 Mass. 62, 213 N.E.2d 252 (1966).

12. —Dishonor.

Endorser of forged check warrants that all signatures and certification on check are genuine and authorized and becomes obligated, upon dishonor, to pay instrument according to its tenor. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Indorser contracts to pay instrument only if dishonored; drawee who mistakenly pays check has recourse only against drawer; warranties made to drawee by presenter and prior transferors of check do not include warranty that drawer of check has sufficient funds on deposit to cover check. Kirby v. First & Merchants

Nat'l Bank, 210 Va. 88, 168 S.E.2d 273 (1969).

13. Discharge from liability.

Warranties of §§ 75-3-414, 75-4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant currency exchange under UCC § 3-417(2) that he had good title to check. Oak Park Currency Exch., Inc. v. Maropoulos, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

14. Drawing without recourse.

Used car dealer's endorsements of notes given to finance broker were not specified to be "without recourse"; held, dealer guaranteed by endorsement that he would pay note upon dishonor. Brown v. Pilini, 128 Vt. 324, 262 A.2d 479 (1970).

When a banking law provides that where a note is given to finance payment of insurance premiums the indorsement by the insurance broker shall be deemed without recourse unless the contrary is expressly stated, such provision applies over the terms of the Uniform Commercial Code under which the "silent" indorsement would be deemed to be with recourse. Standard Premium Plan Corp. v. Wolf, 56 Misc. 2d 522 (1968).

15. Order of liability.

Under UCC § 3-414, liability of payee of promissory note, as endorser of note, was separate and distinct from that of maker or accommodation party; thus, payee-endorser was not indispensable party in action by holder of note against maker and accommodation party, but merely proper party who could be joined at holder's option and whose nonjoinder would not result in prejudice to any party. Inland-Western Inv. Co. v. Winkler Realty Corp., 65 F.R.D. 515 (S.D.N.Y. 1975).

Indorser liability, absent disclaimer thereof, is secondary only because of rights of presentment and dishonor, notice of dishonor, and protest, which are specifically provided for by UCC § 3-414. However, under UCC § 3-511, such rights can be expressly waived by language on face of instrument. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Where bank made loan on condition that debtor-corporation's officers personally endorse notes and that creditor-corporations guarantee payments, and where endorsements of creditor-corporation preceded endorsements of officers of debtor-corporation, endorsees were not liable in order in which they endorsed under presumption raised by UCC § 3-414(2), but were jointly and severally liable under UCC § 3-118(e) in that creditor-corporations signed in same capacity as accommodation parties and as a part of same transaction. Zapp Nat'l Bank v. Metropolitan Planning & Redevelopment Corp., 308 Minn. 309, 242 N.W.2d 96 (1976).

Under UCC § 3-414, second endorser of note was not liable to first endorser and presumption that endorsers were liable in order in which their signatures appeared on note was not overcome even if both endorsers signed note "as a part of the same transaction" under UCC § 3-118, where there was no agreement by second endorser to be jointly liable with first endorser. Wilson v. Turner, 29 N.C. App. 101, 223 S.E.2d 539 (1976), review denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

Where a prior indorser of a note signed it solely as an accommodation to a subsequent indorser to facilitate the latter securing bank acceptance of the loan, and it was understood between them that the prior indorser, would not be liable to the accommodated indorser the estate of the latter indorser who had redeemed the note during his lifetime could not recover from the accommodating party. Niebergall v. A.B.A. Contracting & Supply Co., 24 A.D.2d 799 (3d Dep't 1965).

The estate of a subsequent indorser who redeemed a promissory note during his lifetime cannot recover from a prior indorser where the evidence revealed that the latter signed the note solely as an accommodation for the subsequent indorser to facilitate his securing a loan, and it was understood between them that the prior indorser would not be liable to the accommodated party in the event of default. Niebergall v. A.B.A. Contracting & Supply Co., 24 A.D.2d 799 (3d Dep't 1965).

16. Practice and procedure.

Under UCC § 3-414, liability of payee of promissory note, as endorser of note, was separate and distinct from that of maker or accommodation party; thus, payee-endorser was not indispensable party in action by holder of note against maker and accommodation party, but merely proper party who could be joined at holder's option and whose nonjoinder would not result in prejudice to any party. Inland-Western Inv. Co. v. Winkler Realty Corp., 65 F.R.D. 515 (S.D.N.Y. 1975).

Bank that gave purchasers of cashier's checks timely notice of dishonor of indorsed draft used by purchasers in payment for cashier's checks thereby preserved its right to charge purchasers on their contract of indorsement and their coextensive warranties of transfer, so as to permit offset of any liability by bank to purchasers for wrongful stoppage of payment on cashier's checks. Munson v. American Nat'l Bank & Trust Co., 484 F.2d 620 (7th Cir. Ill. 1973).

Trial judge was free to find on conflicting evidence, including at least two documents signed by defendant, that defendant had agreed to indemnify third-party defendant against liability on note and thus had not indorsed note as accommodation to third-party defendant. City Bank & Trust Co. v. Siagel, 1 Mass. App. Ct. 804, 294 N.E.2d 447 (1973).

Corporate officer, who indorsed note to law firm as partial payment of attorney's fees previously incurred by corporation and who contended that he indorsed note individually and not as agent for corporation through unilateral mistake by reason of his lack of legal training, could not testify as to his unilateral mistake of intent and could not escape liability on the note, in absence of allegation that note holder had any knowledge of corporate officer's mistake or that there existed any element of misrepresentation or fraud on part of holder of note or mutual mistake of parties. Bottoms v. Lyons, 487 S.W.2d 813 (Tex. Civ. App. 1972).

III. DECISIONS UNDER FORMER STATUTES.

17. Decisions under former Code 1942 § 79.

An indorsement "without recourse" does not impair the negotiable character of a promissory note. Nash v. Homeowners Mtg. Corp., 194 So. 2d 211 (Miss. 1967).

A qualified indorser warrants that the signature of the maker of an instrument is not a forgery, and is liable to the indorsee for damages in case of a breach of such warranty. Securities Inv. Co. v. Williams, 193 So. 2d 719 (Miss. 1967).

The assignor of a promissory note who transferred it without recourse is, nevertheless, liable to the assignee for its genuineness, and where the note is a forgery transferor may rescind the sale and recover the purchase price from assignor. Securities Inv. Co. v. Williams, 193 So. 2d 719 (Miss. 1967).

The two statutory provisions regarding qualified indorsement and indorsement generally must be read together. Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

Indorser intending to qualify indorsement without using words "without recourse" must use words clearly expressing such intention. Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

Indorsement on note reading "this is to certify that I have this day sold all my right, title and interest to the within note and mortgage" held "general indorsement in due course." Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

18. Decisions under former Code 1942 § 107.

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Payee of note who indorsed it before maturity for transfer by his signature, preceded by the words "for value received I hereby transfer to" indorsee, was liable thereon as indorser. Perry v. Consumers Lumber & Supply Co., 182 Miss. 112, 180 So. 385 (1938).

Indorser was not relieved of liability on note because of continuance of case against maker during which maker became insolvent, where same firm of attorneys represented maker and indorser, and indorser was informed but made no objection to continuance. Perry v. Consumers Lumber & Supply Co., 182 Miss. 112, 180 So. 385 (1938).

Transfer of nonnegotiable note and deed of trust did not amount to "general indorsement." Allen v. Smith & Brand, 160 Miss. 303, 133 So. 599 (1931).

19. Decisions under former Code 1942 § 108.

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff, was a "bill of exchange," on which drawer was primarily liable and attorney secondarily liable. Parrish v. Feldman, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

20. Decisions under former Code 1942 § 109.

An indorser is not primarily liable, but only secondarily liable. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where chancery court authorized receiver of bank to release first indorser on note, upon payment of certain sum, decree discharging first indorser and holding second indorser, held unauthorized where without second indorser's consent. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

21. Decisions under former Code 1942 § 233.

Where the holder of accommodation paper, collateral for the note of the accommodated party, extended the time of payment of the latter's note by a binding agreement, without the knowledge or consent of the maker of the accommodation paper, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker could not be held liable, notwithstanding that the accommodated party gave a cross note to the accommodation maker, since the latter was merely given to evidence the transaction. Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).

Liability as endorser of note as collateral security for another, not having matured at endorser's death, need not be probated as claim. Sledge & Norfleet Co. v. Dye, 140 Miss. 779, 106 So. 519 (1926).

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§ 75-3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

(1) The warrantor is a person entitled to enforce the instrument;

(2) All signatures on the instrument are authentic and authorized;

(3) The instrument has not been altered;

(4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-416: Codes, 1942, § 41A:3-416; Laws, 1966, ch. 316, § 3-416; Laws, 1992, ch. 420, § 54; Laws, 2010, ch. 506, § 21, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.
12. Authorized signatures.
13. Warranty of good title.
14. Forged instrument or indorsements.
15. Particular cases.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

A party is not liable for breach of a warranty as to the genuineness of an indorsement unless it is shown that the claimant would not have suffered a given loss if the indorsement had been genuine. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

12. Authorized signatures.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-

213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, fact that bank failed to comply with signature card requiring two signatories on checks in question, was not sufficient to establish lack of good faith on part of bank, so as to preclude bank's assertion that as to those checks of which corporation was actual payee, corporation breached UCC § 3-417 (1)(b)'s warranty that it had no knowledge that signatures were unauthorized. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

13. Warranty of good title.

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

14. Forged instrument or indorsements.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

The narrowly circumscribed right of a payor bank to recover its payment of a check with a forged drawer's signature is the result of a policy decision traditionally anchored in the presumption that the payor bank knows, or should know, the signature of its drawer customer (see UCC § 3-417 and Official Comment 4) and thus is in a superior position to detect a forgery before making payment. A further justification for the payor bank's limited right is that it is highly desirable to end a transaction on an instrument when it is paid, rather than to reopen and upset a series of commercial transactions at a later date when the forgery is discovered (see UCC § 3-418 and Official Comment 1). Accordingly, the legislature has determined that the risk of loss with respect to an instrument with a forged drawer's signature generally should lie with the payor bank after payment has been made, and that such risk is a cost incidental to doing business as a bank. Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978).

A drawer of a check has no right of action against a collecting bank, albeit a depositary bank, when a forged indorsement is involved, the drawer's remedy being to proceed against the drawee bank. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 61 A.D.2d 628 (1st Dep't 1978), aff'd, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979).

Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant to currency exchange under UCC § 3-417(2) that he had good title to check. Oak Park Currency Exch., Inc. v. Maropoulos, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments. Society Nat'l Bank v. Capital Nat'l Bank, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

Drawer of check can directly sue collecting bank which makes payment on check bearing forged signature of payee, where amount of check is charged to account of drawer. Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank, 315 F. Supp. 520 (E.D. Wis. 1970).

A forged indorsement gives rise to a cause of action in the drawee bank only if the drawer has the right to and does set up forgery as a bar to charging the drawer's account with the amount of the check. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

15. Particular cases.

In action by endorser of promissory note against its maker where plaintiff alleged that he was manager of branch office of life insurance company, that defendant purchased insurance contract for which he executed and delivered note payable to bank, and that plaintiff endorsed note as accommodation party, where note was endorsed without recourse and was signed "Duane S. Wolfram (Manager)", and where plaintiff alleged that he paid note when defendant defaulted at due date, although endorsement "without recourse" absolved endorser from liability on instrument, it did not insulate him from liability based on breach of warranties contained in UCC § 3-417 and, thus, plaintiff may have had obligation to discharge debt notwithstanding his qualified endorsement. Wolfram v. Halloway, 46 Ill. App. 3d 1045, 361 N.E.2d 587 (1st Dist. 1977).

Collecting bank which guaranteed indorsement on checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer's account. First Bank & Trust Co. v. County Nat'l Bank, 281 So. 2d 515 (Fla. App. 1973).

RESEARCH REFERENCES

ALR. Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

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§ 75-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized; and

(4) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration. If a drawee asserts a claim for breach of warranty under subsection (a)(4), the warrantor may defend by proving that the person on whose account the remotely created check is drawn is precluded under Section 75-4-406, as applicable, from asserting against the drawee the unauthorized issuance of the check.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-417: Codes, 1942, § 41A:3-417; Laws, 1966, ch. 316, § 3-417; Laws, 1992, ch. 420, § 55; Laws, 2010, ch. 506, § 22, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.
12. Authorized signatures.
13. Warranty of good title.
14. Forged instrument or indorsements.
15. Particular cases.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

A party is not liable for breach of a warranty as to the genuineness of an indorsement unless it is shown that the claimant would not have suffered a given loss if the indorsement had been genuine. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

12. Authorized signatures.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, fact that bank failed to comply with signature card requiring two signatories on checks in question, was not sufficient to establish lack of good faith on part of bank, so as to preclude bank's assertion that as to those checks of which corporation was actual payee, corporation breached UCC § 3-417 (1)(b)'s warranty that it had no knowledge that signatures were unauthorized. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

13. Warranty of good title.

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

14. Forged instrument or indorsements.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840 (Miss. 1979).

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Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant to currency exchange under UCC § 3-417(2) that he had good title to check. Oak Park Currency Exch., Inc. v. Maropoulos, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

Drawee bank which paid a forged instrument was not entitled to retain amount paid to it by collecting bank which mistakenly believed it had a legal obligation to reimburse drawee, and which further mistakenly believed that collecting bank's depositor would not object to being charged with funds represented by a forged check. Valley Bank v. Bank of Commerce, 74 Misc. 2d 195 (1973), aff'd in part and rev'd in part, 13 U.C.C. Rep. Serv. (Callaghan) 515 (N.Y. App. Term 1973).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments. Society Nat'l Bank v. Capital Nat'l Bank, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

Drawer of check can directly sue collecting bank which makes payment on check bearing forged signature of payee, where amount of check is charged to account of drawer. Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank, 315 F. Supp. 520 (E.D. Wis. 1970).

A forged indorsement gives rise to a cause of action in the drawee bank only if the drawer has the right to and does set up forgery as a bar to charging the drawer's account with the amount of the check. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

15. Particular cases.

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Collecting bank which guaranteed indorsement on checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer's account. First Bank & Trust Co. v. County Nat'l Bank, 281 So. 2d 515 (Fla. App. 1973).

§ 75-3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c), if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to Section 75-4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c), if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a), the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by Section 75-3-417 or 75-4-407.

(d) Notwithstanding Section 75-4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b), the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

SOURCES: Former § 75-3-418: Codes, 1942, § 41A:3-418; Laws, 1966, ch. 316, § 3-418; Laws, 1992, ch. 420, § 56, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-418.

11. In general.
12. Forged instruments or signatures.
13. Money orders.
14. Certification.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-418.

11. In general.

When payor bank has paid a check by failing to return it by bank's midnight deadline, bank may be entitled to relief under UCC § 3-418. Under this statute, payment of a check is final only in favor of holder in due course or one who in good faith has changed his position in reliance on such payment. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee, under UCC § 3-418 payment of check in favor of defendant was final since defendant was holder in due course and had changed its position in good faith reliance on payment of check. Richardson Co. v. First Nat'l Bank, 504 S.W.2d 812 (Tex. Civ. App. 1974), ref. n.r.e (Apr. 3, 1974).

Payment by drawee bank of check bearing signature of fictitious payee was final within meaning of § 3-418, and drawee could not recover back payment from collecting bank which guaranteed indorsement, so that collecting bank's voluntary refund or payment was not insured loss. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

When a note is given subsequent to the making of the loan, the antecedent application is sufficient to make the later note binding. Epstein v. Paskow & Epstein, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

Where the drawee of drafts maintained a checking account in a collector bank and made a check payable to the bank's order in purported payment of the drafts which were stamped "paid" and surrendered to the drawee, delivery of the check constituted payment just as effectively as if cash had been given. The payment to the collecting bank was equivalent to payment of the owner of the instrument, a holder in due course. F & M Nat'l Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

12. Forged instruments or signatures.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of Price v. Neal (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based). United States v. Pavloski, 574 F.2d 933 (7th Cir. Wis. 1978).

The narrowly limited rights of a payor bank to recover its payment of a check with a forged drawer's signature, the payor bank being bound by its payment if no warranties are applicable or if payment was made to a holder in due course or to a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), thereby generally placing the risk of loss with respect to such an instrument upon the payor bank as a cost incident to doing business as a bank, are the results of a policy decision anchored in the presumption that the payor bank knows or should know the signature of its customer, the drawer, and is, therefore, in a superior position to detect a forgery before making a payment, and may also be justified on the ground that it is highly desirable to end the transaction on an instrument when it is paid rather than to reopen and upset a series of commercial transactions at a later date when the forgery is discovered. Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978).

On plaintiff payor bank's motion for summary judgment in action to recover from indorser amount paid out on check on which drawer's signature had been forged, court held (1) that under UCC § 3-418, plaintiff was bound by its payment if no warranties were applicable and defendant indorser was either holder in due course or one who had in good faith changed his position in reliance on such payment; (2) that since record in case contained no allegations as to defendant's knowledge of forgery of drawer's signature, court could not determine whether defendant had breached its warranty under UCC § 4-207(1)(b) to plaintiff; (3) that record also contained insufficient information as to whether defendant was holder in due course or one who had in good faith changed his position in reliance on plaintiff's payment; and (4) that plaintiff's contention that it was subrogated under UCC § 4-407(c) to rights of drawer of check in suit against holder thereof, because plaintiff had paid check under circumstances giving drawer right to object to such payment, lacked merit since customer's limited warranty under UCC § 4-207(1)(b) that he had no knowledge that drawer's signature was unauthorized is not even given to drawer with respect to drawer's own signature by customer who is holder in due course and has acted in good faith (see UCC § 4-207(1)(b)(ii)) (holding that summary judgment could not be granted to either plaintiff or defendant). Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978).

Where forger, using stolen preprinted checks belonging to plaintiff construction company and utilizing plaintiff's facsimile check signature machine (or perfect copy of signature produced by such machine), drew checks in plaintiff's name to order of two probably fictitious sole proprietorships, and where unknown person subsequently deposited such checks, after indorsing them with probably fictitious name in individual and not representative capacity, and then withdrew such funds from depositary bank, (1) plaintiff's loss was forged check loss and not indorsement loss; (2) indorsements, whether genuine or fictitious, on checks were effective under UCC § 3-405(1)(b), since named payees were not intended to have any interest in checks; (3) indorser's failure to indorse checks in representative capacity did not shift plaintiff's loss to depositary, collecting, and drawee banks under theories of improper payment, breach of title warranty, and conversion, since there were no true payees to demand payment and thus subject plaintiff to double liability; and (4) depositary and collecting banks, on satisfying requirement of final payment rule in UCC § 3-418 as to being holders in due course, could assert protection of such rule against plaintiff's causes of action for common-law negligence and restitution in connection with banks' handling of forged checks, despite incomplete indorsements on such checks. Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. Ga. 1977), reh'g denied, 557 F.2d 823 (5th Cir. Ga. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

13. Money orders.

While a postal domestic money order is not similar in all respects to a negotiable instrument because such an order contains a prohibition against more than one indorsement of the order, it sufficiently resembles a negotiable instrument so that the rule of finality of payment embodied in the instant section should be applied to it. Where, therefore, a bank cashed forged postal money orders and received money from the Government, the amounts so paid could not be recovered back by the Government from the bank. United States v. First Nat'l Bank, 263 F. Supp. 298 (D. Mass. 1967).

14. Certification.

Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depositary bank obtained certification of check from drawee bank, drawee bank subsequently notified depositary bank that it was rescinding its certification, but depositary bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depositary bank was not "holder in due course" under UCC § 4-209 notwithstanding customer owed money to depositary bank and bank had right to set-off such indebtedness against customer's account; since check was "deposited in an account" and since credit given was never withdrawn or applied, depositary bank had no security interest in check under UCC § 4-208 and hence it had not given value under UCC § 3-303 or 4-209 at time it received notice of defense, it was not holder in due course under UCC § 4-209 and certification was not final in favor of depositary bank under UCC § 3-418. Rockland Trust Co. v. South Shore Nat'l Bank, 366 Mass. 74, 314 N.E.2d 438 (1974).

RESEARCH REFERENCES

ALR. Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

§ 75-3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in Section 75-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) If the signature of a party to an instrument is accompanied by words indicating that the party guarantees payment or the signer signs the instrument as an accommodation party in some other manner that does not unambiguously indicate an intention to guarantee collection rather than payment, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument in the same circumstances as the accommodated party would be obliged, without prior resort to the accommodated party by the person entitled to enforce the instrument.

(f) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. In proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

SOURCES: Former § 75-3-419: Codes, 1942, § 41A:3-419; Laws, 1966, ch. 316, § 3-419; Laws, 1992, ch. 420, § 57; Laws, 2010, ch. 506, § 23, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-415.

11. In general.

12. What constitutes accommodation maker.
13. —Party to note.
14. —Spouses as accommodation makers.
15. Liability of accommodation party as indorser.
16. —Liability as maker.
17. Defenses; lack of consideration.
18. —Usury.
19. —Fraud.
20. Discharge from obligation.
21. Liability to accommodated party.
22. Rights of accommodation party.
23. —Subrogation rights.
24. Practice and procedure.
25. —Parol evidence.

III. DECISIONS UNDER FORMER STATUTES.

26. Decisions under former Code 1942 § 70.
27. Decisions under former Code 1942 § 105.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-415.

11. In general.

Effect of assumption agreement is to make parties thereto liable on promissory note. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

Parties who sign guaranty agreement are sureties on promissory note because of that agreement. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

To determine whether party is accommodation maker of note under UCC § 3-415(2), entire transaction should be viewed as a whole (where defendant was alleged accommodation maker of original note and also two renewal notes). Stockwell v. Bloomfield State Bank, 174 Ind. App. 307, 367 N.E.2d 42 (1977).

12. What constitutes accommodation maker.

Where sole stockholders of corporation signed promissory note in both personal and corporate capacity, loan was important to preservation of their interest in corporation and note contained clause stating that all signers were principals, individuals signed note in capacity of comakers and knowingly incurred personal liability; accordingly, defenses enumerated in UCC § 3-606 and, in particular, defense that there was unjustifiable impairment of collateral, was not available to them. Wohlhuter v. St. Charles Lumber & Fuel Co., 25 Ill. App. 3d 812, 323 N.E.2d 134 (2d Dist. 1975), aff'd, 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

In action by payee against maker of promissory notes, payee was not entitled to recover where no consideration existed for maker's signature and maker signed and delivered notes so that payee could make financial statement with which to get loan and settle up with maker; fact that maker's signing was not gratuitous was immaterial and fact that notes were not negotiated did not affect maker's accommodation status. Darden v. Harrison, 511 S.W.2d 925 (Tex. 1974).

Trial judge was free to find on conflicting evidence, including at least two documents signed by defendant, that defendant had agreed to indemnify third-party defendant against liability on note and thus had not indorsed note as accommodation to third-party defendant. City Bank & Trust Co. v. Siagel, 1 Mass. App. Ct. 804, 294 N.E.2d 447 (1973).

One might be accommodation maker of note even though note does not indicate that he signed it as accommodation maker. Oregon Bank v. Baardson, 256 Or. 454, 473 P.2d 1015 (1970).

Maker was not accommodation party where only parties to note were maker and payee. Bank of Am. v. Superior Court, 4 Cal. App. 3d 435 (4th Dist. 1970).

Purchaser who did not sign note could not have been accommodation party thereon where auto dealer was maker of note and former owner of auto was payee. McIntosh v. White, 447 S.W.2d 75 (Mo. Ct. App. 1969).

Although it appeared that corporate secretary was jointly liable with corporation as individual maker of note despite questions as to what, if anything, was established between parties and as to whether squiggle appearing under secretary's name could reasonably be understood to mean "secretary", secretary who had signed notes on back above corporate indorsement was also liable to holder as accommodation party. Factors & Note Buyers, Inc. v. Green Lane, Inc., 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

Where the two makers of a note owned all of the stock of a corporation which received the proceeds of the loan represented by the note it was properly held that the two were co-makers, as against the contention that one was an accommodation party, with the result that there was the right of contribution by the one paying the note against the other maker. MacArthur v. Cannon, 4 Conn. Cir. Ct. 208, 229 A.2d 372 (1967), certification denied, 154 Conn. 748, 227 A.2d 562 (1967).

Payee of a promissory note who endorsed it to the order of note's purchaser at request of a third person became an accommodation party, as defined in subsec. (1). James Talcott, Inc. v. Fred Ratowsky Assocs., 38 Pa. D. & C.2d 624 (1965).

13. —Party to note.

Where original loan was made directly to sole shareholders of corporation individually, and not to corporation, entire amount of loan was received by them individually and then transferred to corporation, and corporation was not even party to loan, individual shareholder was not accommodation party and was not entitled to recover as such from corporation. Jones v. San Angelo Nat'l Bank, 518 S.W.2d 622 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 4, 1975).

Makers of notes could not be considered accommodation parties within meaning of UCC, where bank allegedly accommodated was not "another party" to note in question. State Bank v. Sentel, 10 Ill. App. 3d 86, 293 N.E.2d 444 (4th Dist. 1973).

One cannot be accommodation party where party allegedly accommodated was not party to note. Reaching same result under both Florida and Pennsylvania law without deciding which is applicable. Commerce Nat'l Bank v. Baron, 336 F. Supp. 1125 (E.D. Pa. 1971).

Defendant in action on note could not claim status of accommodation party where person allegedly accommodated was not party to note. Commerce Nat'l Bank v. Baron, 336 F. Supp. 1125 (E.D. Pa. 1971).

14. —Spouses as accommodation makers.

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. Cissna Park State Bank v. Johnson, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

Wife was accommodation maker and liable on note which she cosigned to enable husband to get loan; consideration which supported her promise to pay was that moving to accommodated husband. Seaboard Fin. Co. of Conn., Inc. v. Dorman, 4 Conn. Cir. Ct. 154, 227 A.2d 441 (1966).

The instant section was referred to in Rose v. Homsey (1964) 347 Mass 259, 197 NE2d 603, 2 UCCRS 129, in connection with the proposition that under former c 107, § 52 a wife who signed a note executed by her husband, without personally receiving any consideration for it, to aid her husband in his business was an accommodation maker. Rose v. Homsey, 347 Mass. 259, 197 N.E.2d 603 (1964).

15. Liability of accommodation party as indorser.

Accommodation indorser of note, by waiving presentment, demand, protest, and notice of dishonor and also by virtue of language in note making each signer bound thereon as a principal and not as a surety, became primarily liable on note in the contractual sense, and creditor could have looked to him for payment of note in full. In addition, under UCC § 3-415(1) and Official Comment 1, such accommodation indorser, by virtue of his status as accommodation party, was surety of debtor and secondarily liable on note in sense that debtor should have paid note himself (holding that language in note in suit did not constitute waiver of accommodation indorser's suretyship status as to underlying agreement between accommodation indorser and debtor). Warren v. Washington Trust Bank, 19 Wash. App. 348, 575 P.2d 1077 (1978), modified on other grounds, 92 Wash. 2d 381, 598 P.2d 701 (1979).

Cosigners of a note are usually divided into two categories, principals and sureties. If one is a surety, he is usually termed an "accommodation party" (see UCC § 3-415(1)) or a "guarantor" (see UCC § 3-416). A surety (accommodation party) is primarily liable with the principal (maker) to the payee of a note because he lends his name to the note as security (see UCC § 3-415(2)). However, the rights and obligations of a surety are different from those of a principal, one important difference being that if the surety pays the judgment, he stands in the shoes of the creditor and may sue on the judgment itself. In such a case, he has the burden of proving suretyship, and his burden is onerous, since it is presumed that one signs as a comaker unless the suretyship relation between the cosigners appears on the face of the note (holding that plaintiff, who alleged that he was merely surety on note, failed to rebut presumption that he had signed as comaker, since he did not make note part of his summary judgment proof and court thus could not ascertain whether surety relationship alleged actually appeared on face of note). Caldwell v. Stevenson, 567 S.W.2d 278 (Tex. Civ. App. 1978).

Person who signed corporate note in both representative capacity as president of such corporation and also in individual capacity could not escape liability on ground that he was mere accommodation maker who had neither borrowed nor received any money from holder, since under UCC § 3-415(1) accommodation party is always a surety and term "surety" includes a "guarantor." Thus, defendant stood in position of surety, even though he was primarily liable on instrument, since his liability was subject to no conditions precedent. V.I.P. Com. Contractors v. Alkas, 553 S.W.2d 656 (Tex. Civ. App. 1977).

Since accommodation party under UCC § 3-415(2) is liable in capacity in which he signed instrument, note executed by two persons as comakers, which contained nothing to show that one of them actually signed only as accommodation maker, subjected both under UCC § 3-118(e) to joint and several liability on such obligation. Estrada v. River Oaks Bank & Trust Co., 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Where president of corporation signed promissory note as president of corporation and also signed note personally, under UCC § 3-402 president clearly and unambiguously did not sign promissory note in representative capacity but as "accommodation party" under UCC § 3-415(1), making president personally liable on note. Sullivan County Nat'l Bank v. Lieman, 89 Misc. 2d 780 (1977).

Accommodation status of signer of note does not affect liability of signer to payee. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Under UCC § 3-415, accommodation party, on indorsing check drawn by another, became liable on instrument in capacity in which she signed it. Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Holder of promissory note had no obligation to demand additional collateral from defaulting debtor before he proceeded against accommodation indorser; holder's failure to record note did not constitute "unjustifiable impairment of collateral" under UCC § 3-606(1)(b), relieving accommodation indorser of any further obligation on note, since recording of promissory note would not convert it into security interest in obligor's property, absent collateral, and no collateral accompanied note in question. First State Bank v. Raiton, 377 F. Supp. 859 (E.D. Pa. 1974).

Under UCC §§ 3-415(2) and 3-511(2), holder of 7 demand promissory notes made by corporate maker was entitled to enforcement against two individual accommodation indorsers without presentment, protest or notice of dishonor, where notes provided that maker and indorsers waived presentment, protest and notice of dishonor; there was nothing which permitted accommodation indorsers to escape from effect of waiver provision, which by its express terms was applicable to indorser, merely because they were accommodation indorsers; furthermore, individual accommodation indorsers were not entitled to assert defense of usury inasmuch as it was not available defense for corporate maker of notes. Bank of Del. v. NMD Realty Co., 325 A.2d 108 (Del. Super. 1974).

Liability of accommodation indorser to parties other than one accommodated is same as though accommodation indorser was indorser for value. Fairfield County Trust Co. v. Steinbrecher, 5 Conn. Cir. Ct. 405, 255 A.2d 144 (1968).

Although purchaser of promissory note acquired it under an irregular endorsement which prevented him from becoming a holder, he was still a taker for value before maturity to whom an accommodation party is liable. James Talcott, Inc. v. Fred Ratowsky Assocs., 38 Pa. D. & C.2d 624 (1965).

16. —Liability as maker.

Accommodation party who signed note and deed of trust as maker was bound on such instruments to same extent as his co-maker (see UCC § 3-415(2)). Caito v. United Cal. Bank, 20 Cal. 3d 694, 576 P.2d 466 (1978).

In action for balance due on promissory note, where defendant claimed that he was merely accommodation indorser of note and not a comaker but admitted, as note clearly indicated, that he had signed note in lower righthand corner instead of on back where spaces were expressly provided for indorsers, defendant was liable as comaker under UCC § 3-402. Moreover, in such suit defendant's alleged accommodation status was inconsequential, since accommodation maker under UCC § 3-415 is liable on instrument without any resort to his principal. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Where corporation that signed note failed to show that holder induced it to become accommodation party or that holder actually agreed it would not be held liable as principal, but rather that other co-makers induced it to sign note, even if corporation could show by parol that it was accommodation maker, under UCC § 3-415(2) corporation would have no defense against holder in action on note. First Pa. Bank v. Weber, 240 Pa. Super. 593, 360 A.2d 715 (1976).

Woman who signed promissory note and pledged savings passbook as accommodation for her brother was liable to payee of note as accommodation maker, notwithstanding that as condition for signing note and pledging her collateral, plaintiff required her brother to obtain credit insurance for six-months term of note, note was thereafter extended without notice to her, and her brother died during extended term, where plaintiff voluntarily signed note as maker, without being deceived in any way as to its contents or legal effect thereof, where in note she affirmatively agreed to continue use of her collateral in case of extension thereof and affirmatively agreed to extension or renewal of note without notice to her, and where she did not require, as condition for renewal of note, credit insurance also being extended or renewed. Vinick v. Fourth Nat'l Bank, 531 P.2d 327 (Okla. 1974).

17. Defenses; lack of consideration.

In action by insurance company to recover on renewal note, where both original note and renewal note in suit were executed for value by defendant as maker, plaintiff was payee of both notes, and no other persons were parties to such notes, defendant could not escape liability on renewal note by contending that he was mere "accommodation maker" who had lent his name to another party to an instrument within meaning of UCC § 3-415(1) and was not liable to party accommodated under UCC § 3-415(5), even though evidence showed that defendant did execute both notes to accommodate person who held controlling interest in plaintiff company. Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. Neb. 1977).

Under UCC § 3-415(2) and Official Comment 3, the obligation of accommodation party is supported by any consideration for which the instrument is taken before it is due. Thus, if two or more signed a note, the defense of no consideration is not available to the one who signed but did not receive any of the proceeds. In such case, the accommodation party is bound by the consideration moving to the other party. Warren v. Washington Trust Bank, 19 Wash. App. 348, 575 P.2d 1077 (1978), modified on other grounds, 92 Wash. 2d 381, 598 P.2d 701 (1979).

Under UCC § 3-415(2), only maker of note, and not accommodation maker, can assert failure of consideration as defense. An accommodation maker's consideration is the receipt by the primary obligor of the proceeds of the loan, and no separate consideration need run to the accommodation maker. Stockwell v. Bloomfield State Bank, 174 Ind. App. 307, 367 N.E.2d 42 (1977).

In action by bank against accommodation party on promissory notes, accommodation party was liable to bank under UCC § 3-415(2), since obligation of accommodation party was adequately supported by monetary consideration furnished to maker of notes, even though it was furnished prior to signature of accommodation party. St. Charles Nat'l Bank v. Ford, 39 Ill. App. 3d 291, 349 N.E.2d 430 (2d Dist. 1976).

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. Cissna Park State Bank v. Johnson, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

In action by holder of note against makers who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder's taking of note dated June 30, 1972, on July 14, 1972, was within "a reasonable length of time after its issue" under UCC § 3-304(3)(c); and (3) since note was not overdue when holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and 3-415(2). Gill v. Commonwealth Nat'l Bank, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

In action by bank, as payee of notes executed by used car purchasers, against used car dealer to recover unpaid balance due on notes after purchasers defaulted, where dealer had signed notes on back but was not otherwise party to instrument: (1) dealer's signature constituted indorsement of note under UCC § 3-402; (2) since indorsement was not in chain of title, dealer was accommodation indorser under UCC § 3-415 and, since bank took notes with knowledge that he was accommodation indorser, dealer's liability was that of surety; (3) as such, dealer was entitled to such defenses to liability on notes as were afforded to sureties by statute, including UCC § 3-606. First Nat'l Bank v. Hargrove, 503 S.W.2d 856 (Tex. Civ. App. 1973).

An accommodation party cannot claim that there is no consideration for his accommodation as the value received by the principal debtor, the person accommodated, is the consideration for which the accommodation party lends his credit. Hybertsen v. Reimann, 262 Or. 116, 496 P.2d 917 (1972).

Plaintiff-assignee of note was not precluded from recovering on note from defendants-accommodation makers despite argument that plaintiff took assignment of note knowing that it was overdue, was not holder in due course and therefore took instruments subject to defense of want or failure of consideration arising but of contention that defendants received no consideration for adding their signatures to notes as accommodation makers. Hybertsen v. Reimann, 262 Or. 116, 496 P.2d 917 (1972).

Though note was made and indorsed as accommodation and without consideration, absence of consideration is not available as defense to accommodation maker or indorser when instrument is taken for value before it is due. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

The fact that an accommodation party did not receive any consideration is immaterial. Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc., 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

An accommodation maker may assert against the holder who is not a holder in due course any defense which an ordinary maker could assert. County Nat'l Bank v. Mathey-Tissot Watch Co., 4 U.C.C. Rep. Serv. 490 (1967, NY Sup).

The fact that the maker of the note and not the accommodation maker received the consideration is not a defense to the accommodator. Delbrook Assocs. v. Law, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

18. —Usury.

In action under usury statute by individual signers of corporate promissory note against bank to recover interest and penalty on allegedly usurious loan, whether note was usurious depended on construction of note in accordance with nature of parties' obligations as represented by their signatures and there was sufficient evidence to present disputed fact question as to capacity in which plaintiffs signed note, although five signatures on note were unqualified individual signatures and could leave those signing personally obligated under UCC § 3-403(2)(a), where bank claimed that they signed as guarantors of corporate loan and sought to introduce parole evidence under UCC § 3-415(3) to establish such claim and where there was evidence that it was understood by parties that interest rate being charged was not usurious interest because it was being charged to corporation and not individuals. Pinemont Bank v. DuCroz, 528 S.W.2d 877 (Tex. Civ. App. 1975), ref. n.r.e (Jan. 28, 1976).

19. —Fraud.

Where evidence showed that accommodation maker to note was almost illiterate, that nature of transaction was not explained to him by bank, that he did not understand that he was assuming any financial responsibility when he signed the note, and that maker of note falsely and fraudulently misrepresented document, accommodation maker was entitled to present defense of fraud in the factum. United Bank & Trust Co. v. Schaeffer, 280 Md. 10, 370 A.2d 1138 (1977).

20. Discharge from obligation.

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collaterals where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. Beneficial Fin. Co. v. Marshall, 551 P.2d 315 (Okla. Ct. App. 1976).

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

Payment of a note by the accommodation maker did not discharge the obligation which it evidenced, nor did it extinguish the lien of the real estate mortgage by which it was secured. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

21. Liability to accommodated party.

The accommodated party may not sue the accommodation party nor foreclose a mortgage against him. Ridings v. Motor Vessel "Effort", 387 F.2d 888 (2d Cir. N.Y. 1968).

The fact that the accommodated maker has been declared bankrupt does not relieve an accommodator who signs as comaker as he has a primary liability to the holder. Delbrook Assocs. v. Law, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

Whether a signature on a note providing that "makers, endorsers and guarantors waive demand, presentment, protest, notice of nonpayment, and all defenses on the ground of extension of time for payment" was in an accommodation maker or accommodation endorser capacity was of no legal consequence, as the liability of an endorser was secondary only with respect to these rights which were waived. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

In action by guarantor of renewal and extension promissory notes against maker, maker could not claim that guarantor, because he was stockholder, director and secretary-treasurer of corporate comaker, and also guarantor of notes under separate instrument, was accommodated by maker's signing of notes and could not therefore hold accommodation party (maker) liable under UCC § 3-415(5), because company was other party to notes, not guarantor, and maker lent his name, in execution of notes, to enable company, not guarantor, to obtain renewal and extension. Blake v. Coates, 292 Ala. 351, 294 So. 2d 433 (1974).

Although payee may derive incidental benefit from accommodation, that does not, ipso facto, make payee party accommodated; and where maker obtained extension of its obligation to repay bank as result of defendants' indorsement of its renewal note, mere fact that accommodation indorsement was made at request of bank did not alter maker's position as beneficiary of defendants' indorsement and as party accommodated in this transaction. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

Evidence sustained finding that guaranty by individual defendant of two notes of corporate defendant was intended as accommodation for plaintiffs, and as such accommodating party is not liable on notes to party accommodated. T.W. Sommer Co. v. Modern Door & Lumber Co., 293 Minn. 264, 198 N.W.2d 278 (1972).

Assuming that one signing a note as guarantor should be considered as an accommodation party to the instrument and the bank, to whom the note was given, had knowledge of the facts, his remedy after he makes payment is against his codefendants, and as to the bank he is liable in the capacity in which he signed and is estopped by public policy from asserting that the parties agreed that the instrument should not be enforced. National Bank of N. Am. v. Around the Clock Truck Serv., Inc., 58 Misc. 2d 660 (1968).

Even if appellant signed a note only as an accommodation indorser and appellee had knowledge of his capacity, he would still not be relieved of liability. Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968).

The accommodation party is not liable to the party accommodated. United Refrigerator Co. v. Applebaum, 410 Pa. 210, 189 A.2d 253 (1963).

An accommodation party who signs a check for the accommodation of the payee is not liable on the check to the payee. United Refrigerator Co. v. Applebaum, 410 Pa. 210, 189 A.2d 253 (1963).

22. Rights of accommodation party.

Although an accommodation maker may, on paying the note, recover from the party accommodated under UCC § 3-415(5), this is not his sole recourse, even where a judgment has intervened to extinguish the note by merger. In such a case, the accommodation maker, as the assignee of the judgment creditor, can enforce the judgment against the party accommodated. Anna Nat'l Bank v. Wingate, 63 Ill. App. 3d 676, 381 N.E.2d 19 (5th Dist. 1978).

Assignee of guarantor of promissory note, who paid amount due on note and concurrently received note from payee with payee's assignment endorsed thereon, was entitled to sue payor on instrument; UCC § 3-415 and UCC § 3-603 give both accommodation party and stranger to instrument, respectively, rights of recourse on instrument against payor after they have paid or satisfied note. Collection Control Bureau v. Weiss, 50 Cal. App. 3d 865 (2d Dist. 1975).

Contractor who was accommodation party to note executed to obtain his compensation under a contract had right of recourse under UCC § 3-415(5) against debtor who defaulted notwithstanding that direct action against debtor under the contract would have been barred by Contractor's Registration Act. Ilg v. Andrews, 10 Wash. App. 936, 520 P.2d 1385 (1974).

Evidence supported finding that non-stockholders who signed note to stockholders at request of bank, the non-stockholders having been given an exclusive contract by the corporation to secure permanent financing for construction of shopping center project, were accommodation endorsers with right of recourse to recover from signing stockholders any payments non-stockholders made on note. Hanson v. Cheek, 251 Ark. 897, 475 S.W.2d 526 (1972).

Accommodation maker does not have cause of action against party accommodated until accommodation maker pays instrument. Garland v. Shepherd, 445 S.W.2d 602 (Tex. Civ. App. 1969).

The instant section was referred to, for comparison purposes, in a case decided under the prior law in which it was held that an accommodation maker was not in the position of a surety so as to be discharged by an impairment of collateral by the payee. In the same case the court pointed out that under the Uniform Commercial Code "an accommodation party is always a surety" and that the "suretyship defenses ... are not limited to parties who are 'secondarily liable', but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so". Rose v. Homsey, 347 Mass. 259, 197 N.E.2d 603 (1964).

23. —Subrogation rights.

The drafters of UCC § 3-415 considered an accommodation maker to be a surety for the person accommodated. Thus, even apart from the remedy of UCC § 3-415(5), a surety may, after paying the underlying debt, take an assignment of the judgment against himself and the party assured and enforce the judgment against the party assured, thus satisfying the obligation created by payment of the debt. Anna Nat'l Bank v. Wingate, 63 Ill. App. 3d 676, 381 N.E.2d 19 (5th Dist. 1978).

Guarantor who paid notes was subrogated under UCC § 3-415 to rights of creditor and, thus, could sue debtor for reimbursement in county where debtor promised to discharge notes, notwithstanding debtor was resident of another county. Seale v. Hudgens, 538 S.W.2d 459 (Tex. Civ. App. 1976).

Plaintiff who signed notes as accommodation maker and who subsequently paid judgment on notes was entitled under UCC § 3-415 to subrogation interest in mortgages which secured notes. Reimann v. Hybertsen, 275 Or. 235, 550 P.2d 436 (1976), modified, 276 Or. 95, 553 P.2d 1064 (1976).

Accommodation party who pays on instrument is subrogated to rights of holder and should have recourse on instrument, regardless of whether accommodation party received value for his signature or note. In re Appliance Packing & Warehousing Corp., 358 F. Supp. 84 (S.D.N.Y. 1972), aff'd, 475 F.2d 1011 (2d Cir. N.Y. 1973).

In the absence of any fraud or illegality, the accommodation maker of note who paid it and was assigned the note and real estate mortgage securing it became subrogated to the rights of the former holder and could sue the maker on the note and foreclose the mortgage. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

24. Practice and procedure.

In action by accommodation maker against accommodated party to recover amount paid to holder of note, where holder, after such payment, stamped "paid" on note and delivered it to accommodation maker, (1) under UCC § 3-605(1)(a), holder's indorsement on face of note (by stamping "paid" on note) discharged accommodation maker's liability thereon, (2) such indorsement did not discharge accommodated party's obligation to accommodation maker, since such discharge was not apparent on face of instrument, (3) holder's delivery of note to accommodation maker also did not discharge accommodated party's obligation to accommodation maker under UCC § 3-605(1)(b), (4) under UCC § 3-415(5), accommodation maker, on paying note, had right of recourse thereon against accommodated party, and (5) since accommodation maker was entitled to proceed on the written instrument, trial court erred in applying three-year statute of limitations applicable to actions on oral contracts. Payne v. Payne, 219 Va. 12, 245 S.E.2d 133 (1978).

In action on promissory note, defendant's signature on note as borrower, testimony of bank officer relating to discussions with defendant in connection with loan, credit investigation of defendant conducted by plaintiff, completion of financial statement by defendant, and delivery of money to principal obligor supported finding that defendant was liable on note as accommodation party under UCC § 3-415, even though defendant did not receive any proceeds of loan itself. Barber v. Corpus Christi Bank & Trust, 506 S.W.2d 254 (Tex. Civ. App. 1974).

In action by bank on promissory note in which defendant showed he was accommodation maker under UCC § 3-415, all written agreements executed at same time as part of same transaction were admissible in action between original parties under UCC § 3-119. Berger v. Mercantile Nat'l Bank, 231 Ga. 680, 203 S.E.2d 479 (1974).

When an accommodation party is sued he has the burden of proving that the plaintiff is the party who is accommodated, for otherwise the accommodation party is bound by his undertaking. Phareb Assocs. Co. v. Benfari, 4 U.C.C. Rep. Serv. 860 (N.Y. App. Term 1967).

25. —Parol evidence.

Payee of promissory note may be an accommodated party under UCC § 3-415(1); the accommodation party would not be liable under UCC § 3-415(5) to such payee and may, under UCC § 3-415(3), prove such accommodation agreement by parol evidence unless holder is holder in due course without notice of accommodation. Gehrig v. Ray, 332 So. 2d 703 (Fla. App. 1976).

Where corporation that signed note failed to show that holder induced it to become accommodation party or that holder actually agreed it would not be held liable as principal, but rather that other co-makers induced it to sign note, even if corporation could show by parol that it was accommodation maker, under UCC § 3-415(2) corporation would have no defense against holder in action on note. First Pa. Bank v. Weber, 240 Pa. Super. 593, 360 A.2d 715 (1976).

In action against maker of note by guarantors who paid note and took assignment, trial court erred in granting summary judgment against maker where maker alleged that he was accommodation maker and thus not liable to guarantors under UCC § 3-415(5). Since guarantors took instrument after it was due in that no payments had been made on it prior to that time, they were not holders in due course and oral proof concerning accommodation character of maker's execution of note could be shown under UCC § 3-415(2), (3). Swida v. Adams, 138 Ga. App. 347, 226 S.E.2d 139 (1976).

Where both principal and accommodation party are before court, it is inequitable to order judicial sale of security of accommodation party if security of principal is adequate to satisfy claim of creditor. Thus, where grantor of tract of land signed notes merely as accommodation party and where proceeds of sale of property owned by principal debtor were sufficient to discharge liabilities on both notes, property which was security for accommodation obligation should not have been subjected to judicial sale notwithstanding there were secondary claims against property held by principal debtor. Bartley v. Pikeville Nat'l Bank & Trust Co., 532 S.W.2d 446 (Ky. 1975).

While face of promissory note indicated that 3 parties signed as co-makers, in action between themselves, parties who signed note could show their respective liabilities and relationships by parol evidence under UCC § 3-415(3), and where defendant assumed role of guarantor toward plaintiff accommodation maker, defendant was liable to plaintiff for full amount which plaintiff had paid bank on defaulted note. Brown v. Arcuri, 43 A.D.2d 993 (3d Dep't 1974).

In action by bank as holder of promissory note against corporation and two individuals who signed note: (1) failure of bank to perfect purchase money security interest in collateral given as security for note by properly filing financing statement in manner prescribed by UCC § 9-401 was unjustifiable impairment of collateral as contemplated by UCC § 3-606; (2) however, discharge of party to negotiable instrument by reason of unjustifiable impairment of collateral was defense available only to secondary and accommodation parties; (3) where it was clear from face of instrument that individual signers intended to sign note other than as endorsers but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as to capacity in which instrument was signed; and (4) evidence that loan in present case was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signer was director of bank, was sufficient to show that individual signers signed note as makers rather than accommodation parties. Peoples Bank v. Pied Piper Retreat, Inc., 158 W. Va. 170, 209 S.E.2d 573 (1974).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. Jamaica Tobacco & Sales Corp. v. Ortner, 70 Misc. 2d 388 (1972).

Parol evidence is admissible to show party's capacity as accommodation party; and, as payee, holder of instrument who has taken it for value has rights of holder in due course as against accommodation party who signed as maker, except where holder has induced maker to become accommodation party, as by actually agreeing that he should not be held liable as principal. Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc., 221 Pa. Super. 89, 288 A.2d 916 (1972).

The accommodation party may not vary by parol evidence his liability as accommodation party. Phareb Assocs. Co. v. Benfari, 4 U.C.C. Rep. Serv. 860 (N.Y. App. Term 1967).

Parol evidence is not admissible to show that there was an agreement that the holder would never assert a claim against the accommodating party but would look only to the assets of the corporate borrower for payment. Delbrook Assocs. v. Law, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

Where there has been no negotiation of an instrument, an accommodation party may show by parol what the understanding or agreement had been as to his capacity in signing. Deems v. Wilson, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

III. DECISIONS UNDER FORMER STATUTES.

26. Decisions under former Code 1942 § 70.

An indorser in blank of a note before its delivery is an accommodation endorser secondarily liable thereon, and is discharged to the extent that the payee receives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from the proceeds of insurance of such property against fire with loss payable to such payee. Wright v. North River Ins. Co., 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

Whether or not a person is simply an accommodation signer of the contract, is a question for the jury. Universal C.I.T. Credit Corp. v. Turner, 56 So. 2d 800 (Miss. 1952).

A corporation executing through one of its officers an accommodation note was not liable when so to do was beyond the scope of its corporate authority. Ketcham v. Mississippi Outdoor Displays, Inc., 203 Miss. 52, 33 So. 2d 300 (1948).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Whether consideration passed from motor company to one signing conditional sale contract and purchase-money notes in blank as accommodation maker to enable such company to sell paper to credit company for value held immaterial; consideration passing between two companies being sufficient to bind him. Universal Credit Co. v. Thomas, 170 Miss. 21, 154 So. 272 (1934).

Benefit to accommodation indorsers under agreement for loan of money on stock pending its sale constituted good and valuable consideration. Fitzgerald v. Union & Planters' Bank & Trust Co., 153 Miss. 500, 121 So. 148 (1929).

Accommodation party is liable to holder for value only when he became such before maturity. Rylee v. Wilkinson, 134 Miss. 663, 99 So. 901 (1924).

27. Decisions under former Code 1942 § 105.

An indorser is not primarily liable, but only secondarily liable. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

An indorser in blank of a note before its delivery is an accommodation indorser secondarily liable thereon, and is discharged to the extent that the payee receives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from proceeds of insurance of such property against fire with loss payable to such payee. Wright v. North River Ins. Co., 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

§ 75-3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

SOURCES: Laws, 1992, ch. 420, § 58, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-419.

11. In general.
12. Payment upon forged indorsement.
13. —Forged restrictive indorsement.
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I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-419.

11. In general.

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Effect of Code § 3-419(3) providing that representative, including depository or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to business of such representative dealt with instrument or its proceeds on behalf of one who was not true owner is not liable in conversion or otherwise to true owner beyond amount of any proceeds remaining in his hands is to make applicable to commercial paper general rule that person who deals in good faith with property of another is not liable for conversion. Cooper v. Union Bank, 103 Cal. Rptr. 610 (App. 1972), vacated, 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609 (1973).

12. Payment upon forged indorsement.

For purposes of a conversion suit, there is little, if any, difference between unauthorized endorsements and forged endorsements. Delta Chem. & Petroleum v. Citizens Bank of Byhalia, — So. 2d —, 2000 Miss. App. LEXIS 203 (Miss. Ct. App. May 2, 2000), opinion withdrawn by, substituted opinion at 790 So. 2d 862, 2001 Miss. App. LEXIS 117, 44 U.C.C. Rep. Serv. 2d (CBC) 549 (Miss. Ct. App. 2001).

The drawer of a check may sue a depositary bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depositary bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depositary bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under UCC § 3-419(1)(c), the drawee bank's payment of a check on a forged indorsement constitutes conversion of the instrument as to the payee. O.K. Moving & Storage Co. v. Eglin Nat'l Bank, 363 So. 2d 160 (Fla. App. 1978).

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defendant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4), and such issue was one of fact. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

Where (1) money given to plaintiff wife in trust for her children was deposited in savings bank trust accounts at defendant savings bank, (2) plaintiff's husband forged plaintiff's signature on both bank signature cards and also on four withdrawal orders against such trust accounts, (3) defendant savings bank honored withdrawal orders by issuing as payment thereon four checks made payable to plaintiff which were drawn on defendant's own account at another bank, (4) plaintiff's husband forged plaintiff's indorsement on such checks and deposited them in his business account at still another bank, and (5) husband's bank then forwarded such checks to defendant's bank which accepted and paid them, in conversion action against defendant bank, plaintiff established prima facie case since defendant could not under UCC § 4-401 debit plaintiff's account for withdrawals made by plaintiff's husband without plaintiff's authorization and under UCC § 3-419(1)(c), instruments were converted when they were paid on forged indorsements. Payment of the four withdrawal orders bearing plaintiff's forged signature was made by defendant when defendant's own bank accepted the four checks drawn by defendant and paid out on them on defendant's account, and fact that defendant did not pay cash over the counter on such withdrawal orders, but ordered its own bank to make payment thereon, did not alter legal effect of transaction. Ahrens v. Westchester Fed. Sav. & Loan Ass'n, 58 A.D.2d 799 (2d Dep't 1977).

Drawee bank which paid check made out to two joint payees, which had been indorsed without authority by one joint payee with signatures of both, was liable in conversion to joint payee whose signature had been wrongfully indorsed, since payment of check under forged indorsement constitutes specific act of conversion under UCC § 3-419(1)(c). Equipment Distribs., Inc. v. Charter Oak Bank & Trust Co., 34 Conn. Supp. 606, 379 A.2d 682 (Super. Ct. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i. e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. Tubin v. Rabin, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), aff'd, 533 F.2d 255 (5th Cir. Tex. 1976).

Where draft, made payable to three parties, was paid over forged endorsement of one of the parties, under UCC § 3-116 drawer's debt was not discharged as to party whose endorsement was forged; payment of instrument by drawer-drawee constituted conversion of instrument for which drawer-drawee must respond in damages under UCC § 3-419. Lee v. Skidmore, 49 Ohio App. 2d 347, 361 N.E.2d 499 (1976).

Depositary bank was liable to plaintiff insurance company under UCC § 3-419 for conversion of premium check which had been made payable to plaintiff and delivered to insurance agent representing plaintiff, but which was endorsed by agent with plaintiff's name and deposited in agent's account with depositary bank, where agent did not have authority to endorse checks made payable to plaintiff and where plaintiff did not ratify agent's purported endorsement. Hartford Accident & Indem. Co. v. South Windsor Bank & Trust Co., 171 Conn. 63, 368 A.2d 76 (1976).

Cashier's check, which established debtor-creditor relationship between drawee bank and payee, represented conditional payment, so that when neither check not its proceeds ever reached payee or his lawful agent authorized to receive payment, and drawee bank paid check on forged indorsement, drawee bank as payor bank was liable to payee's administratrix for conversion. Myers v. First Nat'l Bank, 42 A.D.2d 657 (3d Dep't 1973).

Purchaser of cashier's checks lost them before delivery to named payees; issuing bank thereafter paid amount of checks on forged endorsements; held, issuing bank would be liable to purchaser or to named payees. Jerman v. Bank of Am. Nat'l Trust & Sav. Ass'n, 7 Cal. App. 3d 882 (2d Dist. 1970).

When the drawee bank pays on a forged indorsement it converts the instrument and is liable for the face of the paper. Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

Where check is paid on forged indorsement, payee of forged check has cause of action for conversion against drawee (payor) bank (change in pre-existing California law; recognizing rule; case involves collecting, not drawee, bank). Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368 (2d Dist. 1967).

13. —Forged restrictive indorsement.

The drawer of a check may sue a depositary bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depositary bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depositary bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under UCC § 3-206(3) and other sections of Uniform Commercial Code dealing with restrictive indorsements, depositary bank that does not apply instrument consistently with restrictive indorsement thereon is liable in conversion, and any defense afforded by UCC § 3-419(3) would not be available to such bank. C.S. Bowen Co. v. Maryland Nat'l Bank, 36 Md. App. 26, 373 A.2d 30 (1977).

14. Liability of collecting bank to drawer.

While payee is entitled to sue depository bank in conversion for money paid to third party which should have been paid to him, drawer has no such right to sue depository or collecting bank for conversion. Allied Concord Fin. Corp. v. Bank of Am., 275 Cal. App. 2d 1 (2d Dist. 1969).

15. Damages; face amount of instrument.

Under UCC § 3-419(1)(c), when drawee bank takes check without payee's indorsement, delivers cash in amount of check to one who is not authorized to receive it, and ultimately returns check to maker, bank has assumed complete control over check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute tortious conversion of check, and payee is entitled to recover its value which, prima facie, is its face value (observing that under allegations of plaintiff's complaint, plaintiff as payee of draft issued by defendant stockbroker was victim of conversion of such draft when broker paid it on forged indorsement). North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

In action by plaintiff, as co-payee of checks, against defendant, a depository-collecting bank, to recover proceeds of checks allegedly converted by defendant, defendant having accepted checks for collection from its customer, the other co-payee of checks, either without plaintiff's indorsement or bearing forged indorsement of plaintiff, plaintiff was not automatically entitled to damages equal to sum of face value of checks, nor was payment sole defense to conversion claim, and defendant was entitled to credit in mitigation of damages where checks were proceeds from sale of hogs, where plaintiff and other co-payee of checks were engaged in joint venture to raise such hogs, and where proceeds of checks were used to discharge liens to which hogs were subject. Yeager & Sullivan, Inc. v. Farmers Bank, 162 Ind. App. 15, 317 N.E.2d 792 (2d Dist. 1974).

16. Reasonable commercial standards.

A bank and its president were not entitled to a directed verdict in an action alleging a scheme to divert checks payable to two corporations into accounts opened by a part owner of the corporations at the bank in names that were similar to the names of the corporations as the bank president and the part owner were lifelong friends and the bank president admitted that checks made payable to the corporation and bearing the "Inc." name as proper payee should not have been deposited into "non-Inc." sole proprietorship accounts. Delta Chem. & Petroleum, Inc. v. Citizens Bank, 790 So. 2d 862 (Miss. Ct. App. 2001).

A directed verdict was erroneously granted with respect to the claims of the plaintiff corporatios for conversion and negligence since sufficient evidence was presented to overcome any finding from the bench that the defendant bank had sustained the "reasonable commercial standard" defense where a bank officer admitted that checks made payable to a corporate entity and bearing the "Inc." name as proper payee should not be deposited into "non-Inc." sole proprietorship accounts. Delta Chem. & Petroleum v. Citizens Bank of Byhalia, — So. 2d —, 2000 Miss. App. LEXIS 203 (Miss. Ct. App. May 2, 2000), opinion withdrawn by, substituted opinion at 790 So. 2d 862, 2001 Miss. App. LEXIS 117, 44 U.C.C. Rep. Serv. 2d (CBC) 549 (Miss. Ct. App. 2001).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Under UCC § 3-419(3), good faith and commercial reasonableness are separate requirements, both of which must be met to support reliance on the statute as a defense. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action against bank for conversion of checks, bank could be exculpated under UCC § 3-419(3) only if it acted in good faith and in accordance with reasonable commercial standards applicable to banking business. Siegel Trading Co. v. Coral Ridge Nat'l Bank, 328 So. 2d 476 (Fla. App. 1976).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where payee's attorney forged payee's endorsement on check and collecting bank accepted check, which was for large amount, although attorney never had substantial balance, collecting bank was not relieved of liability by UCC § 3-419(3) for amount of check since bank theoretically retained check proceeds for rightful owner and bank did not act "in good faith and in accordance with reasonable commercial standards." Sonnenberg v. Manufacturers Hanover Trust Co., 87 Misc. 2d 202 (1976).

Where three-man law partnership was dissolved when one partner left firm but other two partners continued practice under new partnership, where bank account of former partnership was kept open for purpose of depositing receivables of former firm, where check made payable to withdrawn partner and one of his former partners was received by new partnership, bookkeeper rubber-stamped check with indorsement of former partnership, bank deposited proceeds in former partnership account, and where new partnership subsequently withdrew money from former partnership account and withdrawn partner sued bank and former partner alleging conversion of check, judgment in favor of bank and former partner was upheld on two grounds: (1) Since indorsement may be made by agent under UCC § 3-403, and agent's authority may be actual, implied or apparent under UCC § 1-201(43), there was sufficient evidence to support conclusion that apparent authority existed for affixing rubber stamp in lieu of withdrawn partner's signature; (2) Record further supported defense predicated upon UCC § 3-419(3), since there was expert testimony to effect that under circumstances handling of check was in accord with reasonable commercial standards and, although bank knew former partnership had dissolved, it was logical for its account to be kept open for purpose of depositing fees which were subsequently collected for services rendered by old firm. Keane v. Pan Am. Bank, 309 So. 2d 579 (Fla. App. 1975).

Collecting bank acted in commercially reasonable manner in dealing with cashier's check for $7,200, though payee's endorsement was forged, where person from whom check was accepted was good customer of bank for 19 years. Gillen v. Maryland Nat'l Bank, 274 Md. 96, 333 A.2d 329 (1975).

In action by payee against bank which allowed collection of check payable to payee upon forged endorsement, affidavit of bank's employee that it had paid forged check "in usual course of business" was insufficient to satisfy UCC § 3-419(3) requirement that it act in good faith and in accordance with reasonable commercial standards. Robert A. Sullivan Constr. Co. v. Wilton Manors Nat'l Bank, 290 So. 2d 561 (Fla. App. 1974).

In action by insurance claimant against insurance carrier on uninsured motorist's coverage where insurer issued draft payable to claimant and her attorney, attorney without authority endorsed name of his client to draft, received payment therefor and absconded without accounting to client, and where claimant was permitted to recover from insurance company, insurance company was entitled to indemnity against collecting bank; collecting bank was liable to insurer as drawee of draft under its warranty of good title under UCC § 4-207(1)(a) and it was not entitled to assert defense of having acted in good faith and in accordance with reasonable commercial standards under UCC § 3-419(3). First Nat'l Bank v. Progressive Cas. Ins. Co., 517 S.W.2d 226 (Ky. 1974).

Bank did not act in commercially reasonable manner, even though it may have acted in good faith, in paying entire proceeds of check to one of two jointly named payees without first obtaining endorsement of both payees, where bank had no authority to pay proceeds to one payee without first securing endorsement of both payees, and absence of one payee's endorsement could have been readily detected by examination of check; bank therefore could be held liable under UCC § 3-419(3) for conversion. Berkheimers, Inc. v. Citizens Valley Bank, 270 Or. 807, 529 P.2d 903 (1974).

Amounts which payor bank transfers to collecting bank on forged instrument do not constitute proceeds of instrument, unless true owner ratifies collection; and so, absent such ratification, proceeds remain in hands of payor bank, and payor bank is consequently liable for full amount of instrument notwithstanding Code § 3-419(3). Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Bank which failed to inquire as to legality of copayee's signature on draft, treated draft as though it was negotiable bank check, and paid instrument although draft stated on its face "payable through" particular branch bank, failed to deal with this draft in accordance with reasonable commercial standards practiced in banking business and, therefore, had failed to establish defense to conversion under UCC § 3-419(3). Montgomery v. First Nat'l Bank, 265 Or. 55, 508 P.2d 428 (1973).

This section clearly implies that depository or collecting bank is liable in conversion when it deals with instrument or its proceeds on behalf of one who is not true owner without acting in accordance with "reasonable commercial standards", bank did not act in accordance with "reasonable commercial standards" where no inquiry was made as to authority of attorney to endorse check as trustee on behalf of estate and there was no honoring of prior restrictive endorsement of check "for deposit"; use of word "forged endorsement" as constituting conversion under Code § 3-419(1)(c) does not preclude finding of conversion, although unauthorized signature of fictitious trustee does not constitute forgery in strict sense. Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968), aff'd, 105 N.J. Super. 164, 251 A.2d 460 (1969).

17. Liability for remaining proceeds.

In conversion action by true owners of negotiable instruments against collecting bank to recover amounts of instruments handled by it on forged endorsements, Code § 3-419(3) would not shield bank from liability, since inasmuch as full amount of instrument remains in account of drawer when bank pays on forged endorsement, bank manifestly does not part with proceeds of instrument but merely remits other funds from its own account. Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Where check was "payable through" bank, payee could not recover from bank on unauthorized endorsement, since bank was collecting bank within UCC § 3-120, and since UCC § 3-419(3) makes it clear that collecting banks bear no liability to the true owner of a draft or check, except for those proceeds which may remain in possession of said bank. Messeroff v. Kantor, 261 So. 2d 553 (Fla. App. 1972).

18. Practice and procedure.

When check is converted under UCC § 3-419(1)(c), payee-owner has sustained injury to property within meaning of general (non-UCC) statute prescribing three-year period of limitations for injuries to persons and property, and such statute begins to run when check is paid on the forged indorsement. Continental Cas. Co. v. Huron Valley Nat'l Bank, 85 Mich. App. 319, 271 N.W.2d 218 (1978).

The exception set forth in UCC § 3-419(3) is an affirmative defense, and the burden of proving it is on the bank. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Question whether defendant savings and loan association had acted in accordance with reasonable commercial standards applicable to its business, within meaning of UCC § 3-419(3), presented question of fact that precluded granting of plaintiff's motion for summary judgment. Holland Am. Cruises, Inc. v. Carver Fed. Sav. & Loan Ass'n, 60 A.D.2d 545 (1st Dep't 1977).

In action by plaintiff to recover from payor and depository banks face amount of check on which plaintiff's indorsement as payee was forged, trial court erred in dismissing action as to payor bank and in granting summary judgment in favor of depository bank where copayee of check forged plaintiff's indorsement on check, deposited it to his account in depository bank, check was forwarded to and was paid by payor bank, and proceeds were credited to account of copayee, and where, although plaintiff admitted receiving proceeds of check, there was evidence that proceeds were applied toward payment of accounts different from that for which check was issued: (1) under UCC § 3-419(1)(c), check was converted by both banks rendering them liable to plaintiff in absence of valid defense; (2) although payee whose indorsement has been forged and who receives and retains proceeds of check, with knowledge of forgery, and with proceeds being applied to obligation which check was issued to pay, has suffered no damage and, accordingly, cannot recover against bank for paying such check, different rule applies where proceeds, even though received by payee, were not applied by forger to obligation which check was issued to discharge. Conwed Corp. v. First-Citizens Bank & Trust Co., 262 S.C. 48, 202 S.E.2d 22 (1974).

19. —Statute of limitations.

Although a conversion action (Uniform Commercial Code, § 3-419, subd [1], par [c]) based on defendant bank's cashing of forged checks drawn on plaintiff's account is time-barred under the three-year time limitation (CPLR 214), a breach of contract action based upon defendant's withdrawal of plaintiff's funds without permission or consent of plaintiff is timely within the applicable six-year Statute of Limitations (CPLR 213, subd 2) since plaintiff need not be put to the task of electing the conversion action (CPLR 3002, subd [c]) to the preclusion of the contract action. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

An action by the payee of a check against a collecting bank for wrongfully collecting the instrument over a forged indorsement is timely if brought within six years of accrual, since prior to the enactment of the Uniform Commercial Code, the payee of a negotiable instrument possessed a valid cause of action against a bank which had collected the instrument over the payee's forged indorsement and such an action could be styled in either conversion or contract, the latter theory entitling the payee to the benefit of the six-year Statute of Limitations, and the enactment of the Uniform Commercial Code did not change this; § 3-419 (subd [1], par [c]), which provides that an instrument is converted when it is paid on a forged indorsement, does not abolish the pre-code contract action against a collecting bank, restricting the payee's remedy to a suit in conversion with its three-year Statute of Limitations. Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 385 N.E.2d 551 (1978).

Payee's action for conversion of check under UCC § 3-419(1)(c) accrued at time defendant bank wrongfully exercised dominion by cashing check notwithstanding payee's ignorance of facts constituting cause of action. Fuscellaro v. Industrial Nat'l Corp., 117 R.I. 558, 368 A.2d 1227 (1977).

Payee's action against drawee bank was barred by limitations statute of 3 years; cause of action for conversion accrued when check was paid on forged endorsement. Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687 (1970).

RESEARCH REFERENCES

ALR. Nature of property or rights other than tangible chattels which may be subject of conversion. 44 A.L.R.2d 927.

Measure of damages for conversion or loss or commercial paper. 85 A.L.R.2d 1349.

Payee's right of recovery, in conversion under UCC § 3-419(1)(c), for money paid on unauthorized indorsement. 23 A.L.R.4th 855.

Bank's "reasonable commercial standards" defense under UCC § 3-419(3). 49 A.L.R.4th 888.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Payee's and drawer's right of recovery, in conversion under pre-1990 UCC § 3-419, or post-1990 UCC § 3-420 (Rev), for money paid on unauthorized indorsement. 91 A.L.R.5th 89.

Drawer's right of recovery against depositary bank that accepts check with missing indorsement or in violation of restrictive covenant. 104 A.L.R.5th 459.

Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card. 106 A.L.R.5th 701.

Am Jur. 18 Am. Jur. 2d, Conversion §§ 17, 135.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Form 3:661 (complaint, petition, or declaration — allegation — for conversion of note by maker).

CJS. 89 C.J.S., Trover and Conversion §§ 12, 18, 153.

PART 5.

DISHONOR.

SEC.
75-3-501. Presentment.
75-3-502. Dishonor.
75-3-503. Notice of dishonor.
75-3-504. Excused presentment and notice of dishonor.
75-3-505. Evidence of dishonor.
75-3-506 through 75-3-511. Repealed.

§ 75-3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Chapter 4, agreement of the parties, and clearinghouse rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one (1) of two (2) or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.

SOURCES: Former § 75-3-501: Codes, 1942, § 41A:3-501; Laws, 1966, ch. 316, § 3-501; Laws, 1992, ch. 420, § 59, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.
1. Presentment.
2.-10. [Reserved for future use].
II. DECISIONS UNDER FORMER UCC § 75-3-501.
11. In general.
III. DECISIONS UNDER FORMER UCC § 75-3-503.
12. In general.
13. Time for presentment.
14. Other matters.
IV. DECISIONS UNDER FORMER UCC § 75-3-504.
15. In general.
V. DECISIONS UNDER FORMER UCC § 75-3-505.
16. In general.
VI. DECISIONS UNDER FORMER STATUTES.
17. In general.
18. Decisions under former Code 1942 § 112.
19. Decisions under former Code 1942 § 130.
20. Decisions under former Code 1942 § 159.
21. Decisions under former Code 1942 § 227.

I. DECISIONS UNDER CURRENT LAW.

1. Presentment.

Plaintiff presented defendant's check to the bank when he deposited it in his account to obtain the amount of the funds represented on the front of the check. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

The mere drawing of a check or similar instrument creates no liability thereon, and the drawer's account may not be charged under UCC § 3-501(1)(c) until presentation for payment or demand on the instrument is made. Kane v. Insurance Co. of N. Am., 38 Pa. Commw. 42, 392 A.2d 325 (1978).

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. Crescent Credit Corp. v. Union Bank & Trust Co., 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. Chandler Motors, Inc. v. Dunham, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Payee of note payable at bank (treated as equivalent of draft drawn on bank under New York "Alternative A" to Code § 3-121) need not allege presentment and notice of dishonor in complaint against maker or drawer; although Code § 3-501(2) provides that unless excused, in case of drawer, notice of dishonor is necessary, failure to give such notice discharges drawer only as stated in Code § 3-502(1)(b) which becomes matter of defense to be pleaded in answer. County Restaurant & Bar Equip. Co. v. Shaw

Mechanical Contractors, 56 Misc. 2d 832 (1968).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-501(1)(b). Standard Premium Plan Corp. v. Wolf, 56 Misc. 2d 522 (1968).

Presentment and notice of dishonor are entirely excused when notes contain waiver by party to be charged. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

No demand for payment on the makers of a demand note is necessary prior to the entry of a judgment thereon, and a judgment thus entered will not be stricken on the ground that no default of payment was alleged at or prior to the entry of such judgment. Liberty Aluminum Prods. Co. v. Cortis, 14 Pa. D. & C.2d 624 (1958).

III. DECISIONS UNDER FORMER UCC § 75-3-503.

12. In general.

Where depositary bank delivered check to clearing house on Thursday and clearing house in turn sent check to processing bank which had contract with payor bank to process payor bank's checks at its data processing center, where check was held over and not posted until Friday due to fact that routing numbers had been improperly encoded on face of check, through no fault of depositary bank, and, when check was delivered to payor bank on Monday, payor bank dishonored check and notified both depositary and processing banks that check was being returned, and where processing bank accepted return as timely dishonor and credited amount back, but depositary bank refused to accept back check and to reverse tentative settlement, claiming untimely dishonor, depositary bank was not liable to processing bank for amount of check in that (1) delivery by clearing house to processing bank on Thursday constituted presentment to payor bank; and (2) payor bank was obligated at time of presentment to dishonor checks before midnight of next banking day or be held accountable for amount of item regardless of number or complexity of steps taken by processing bank to make payor bank's checks machine processable for decision to pay or dishonor. Capital City First Nat'l Bank v. Lewis State Bank, 341 So. 2d 1025 (Fla. App. 1977), cert. denied, 357 So. 2d 186 (Fla. 1978).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-503. Standard Premium Plan Corp. v. Wolf, 56 Misc. 2d 522 (1968).

The question of whether presentment of an instrument was made within a reasonable time is to be determined by the nature of the instrument, any usage of business, and the facts of the particular case. Lustbader v. Lustbader, 48 Misc. 2d 133 (1965).

In a case in which it was held that the Negotiable Instruments Law did not abrogate the common-law rule that where an instrument was being collected by a bank on behalf of an indorsee, a written demand mailed by the bank to the maker of the instrument to pay the instrument at the bank on the due date was sufficient to make the offices of the bank the place of payment, so that the neglect of the maker to pay the note at the bank amounted to a dishonor of the instrument, a physical exhibition of the note not being required, it was said that the instant section, although not applicable to the case under consideration, would sanction the presentment procedure followed by the bank in the case under consideration. Batchelder v. Granite Trust Co., 339 Mass. 20, 157 N.E.2d 540 (1959).

13. Time for presentment.

Collecting bank, which held for 52 days after presentment for payment three sight drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503(2); and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. Southern Cotton Oil Co. v. Merchants Nat'l Bank, 670 F.2d 548 (5th Cir. 1982).

Where insurance policy was issued on condition that check for premium be honored and check was dishonored after presentment for payment 14 days later, insurance company was not estopped from voiding policy on ground it unreasonably delayed in presenting check for payment as thirty days is presumed to be reasonable period for initiating collection of uncertified check under UCC 3-503(2). Genua v. Kilmer, 37 Colo. App. 365, 546 P.2d 1279 (1976).

Trial court erred in granting directed verdict upon check in favor of payee where drawers testified that parties orally agreed that check was not to be effective and should not be presented for payment until drawees received insurance money from destruction of hay crops by fire. Parol evidence was admissible to show that check was not to be operative as binding obligation until occurrence of some condition precedent. Although insurance proceeds had been received by time of trial and, therefore, check was payable at that time, judgment in favor of payee could not be sustained since present action was on check, not on underlying debt, proper presentment to bank was conditioned precedent to drawers' liability and there was no evidence of any presentment subsequent to receipt by drawers of proceeds of insurance. Engelcke v. Stoehsler, 273 Or. 937, 544 P.2d 582 (1975).

Under UCC §§ 3-502 and 3-503(2), obligation of drawer of dishonored uncertified checks was not per se discharged by payee's presentment of checks for payment more than 30 days after date of issue, where record did not show that drawee bank had become insolvent during delay, thereby depriving drawer of funds with which to cover checks. Grist v. Osgood, 90 Nev. 165, 521 P.2d 368 (1974).

Seven days after indorsement is presumed to be a reasonable time within which indorsee must make presentment of dishonored checks to his indorser, and in the absence of such presentment even a holder in due course could not recover. Dluge v. Robinson, 204 Pa. Super. 404, 204 A.2d 279 (1964).

This section provides that presentation of a check within 30 days is presumed to be within a reasonable time. Visnov v. Levy, 2 Pa. D. & C.2d 686 (1955).

14. Other matters.

Where letter of credit provided that drafts issued against it must be negotiated by specified date and that the credit was subject to the Uniform Customs And Practice for Documentary Credits (1962 revision), and where provision of Uniform Customs And Practice for Documentary Credits stated only that documents must be presented within "reasonable time" after issuance, court, in holding that timeliness of presentment of draft was issue of material fact, would take note of UCC § 1-204(2), dealing with reasonableness of time for taking any action, and UCC § 3-503(2), dealing with time for presenting commercial paper. Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank, 569 F.2d 699 (1st Cir. Mass. 1978).

IV. DECISIONS UNDER FORMER UCC § 75-3-504.

15. In general.

Trial court did not err in failing to grant defendant's motion to transfer venue or for change of venue where debtors on mortgage were domiciled in county where property secured by deed of trust was located, but action was brought in different county; notes given by debtors on their face were payable in county where action was brought, and under § 75-3-504, where negotiable instrument is payable in two places, holder has option to present it at either and is not under obligation to notify maker at which of places demand will be made. Haygood v. First Nat'l Bank, 517 So. 2d 553 (Miss. 1987).

V. DECISIONS UNDER FORMER UCC § 75-3-505.

16. In general.

Code provision that drawee to whom the instrument is presented for payment may require identification and evidence of presentor's authority and signed receipt for partial or full payment does not purport to establish any duty on part of bank; specified precautions are merely made available to drawee without danger that dishonor of instrument will be found to have occurred. Wright v. Bank of Cal., 276 Cal. App. 2d 485 (1st Dist. 1969).

VI. DECISIONS UNDER FORMER STATUTES.

17. In general.

Under this section, plaintiff in an action to recover damages for gross trespass and the forcible seizure of his automobile by a finance company had the right to demand that the original of the note and conditional sales contract be delivered up to him on and at the time of the payment of the last instalment. Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

Presentment of note elsewhere than at bank, where payable, is insufficient to hold accommodation endorser. Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927).

18. Decisions under former Code 1942 § 112.

A contention that presentation of a note payable on demand, since it was overdue when it was indorsed and delivered to the plaintiff, was excused, in view of testimony of two witnesses that, in matters not related to the note, they had been unable to locate the maker, was untenable, such testimony falling far short of showing the exercise of that reasonable diligence by the holder which would excuse presentment. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

19. Decisions under former Code 1942 § 130.

Dishonor and notice must be alleged and proved to recover against indorsers; declaration simply alleging that defendant indorser without setting up dishonor and notice is insufficient. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

Unless blank indorser given notice of dishonor of note by maker, he is discharged. Gresham v. State Bank, 31 Miss. 20, 95 So. 65 (1923).

Indorser not obliged to file plea denying dishonor and notice where declaration states no cause of action. Gresham v. State Bank, 31 Miss. 20, 95 So. 65 (1923).

20. Decisions under former Code 1942 § 159.

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. Thompson v. Gore, 180 Miss. 560, 178 So. 81 (1938).

21. Decisions under former Code 1942 § 227.

A check must be presented for payment within a reasonable time. Presley v. American Guarantee & Liab. Ins. Co., 237 Miss. 807, 116 So. 2d 410 (1959).

One who receives in the regular course of business in good faith and for value, within a reasonable time after date, a check on a bank, drawn payable to order and indorsed in blank by payee, takes it free from equities between original parties of which he had no notice. Hancock v. State Nat'l Bank, 213 Miss. 295, 56 So. 2d 819 (1952).

The transferee of a check is not put upon inquiry and chargeable with notice of possible equities in the drawer, by reason of the fact that the check was dated three, four or five days before the date of transfer. Hancock v. State Nat'l Bank, 213 Miss. 295, 56 So. 2d 819 (1952).

A check was not overdue when it was accepted by the bank and acceptance was timely where it was dated November 29 and was delivered to the bank on December 2, and was credited to the checking account of the party presenting the check, and then the check was forwarded through the banking channels for payment which was refused and check was returned with the words "payment stopped." Under such circumstances the first bank was a holder for value of the check and entitled to recover the amount from the drawer. Hancock v. State Nat'l Bank, 213 Miss. 295, 56 So. 2d 819 (1952).

Generally, reasonable time for presenting check on bank in same business community as recipient is next business day after receipt. Sunflower Compress Co. v. Clark, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

Declaration alleging taxpayer gave tax collector check on bank in collector's town December 12, but that collector did not present check before bank failed December 16, held good against demurrer. Sunflower Compress Co. v. Clark, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

Any damages recoverable by taxpayer for tax collector's failure to present check before failure of bank where such only as were allowed at common law, not under statute requiring presentment within reasonable time. Sunflower Compress Co. v. Clark, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

§ 75-3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under Section 75-4-301 or 75-4-302, or becomes accountable for the amount of the check under Section 75-4-302.

(2) If a draft is payable on demand and paragraph (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsections (b)(2), (3), and (4), except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not

made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under Section 75-3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

SOURCES: Former § 75-3-502: Codes, 1942, § 41A:3-502; Laws, 1966, ch. 316, § 3-502; Laws, 1992, ch. 420, § 60, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1. Dishonor.

2-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-507.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

IV. DECISIONS UNDER FORMER UCC § 75-3-508.

13. Decisions under former Code 1942 § 133.

14. Decisions under former Code 1942 § 137.

15. Decisions under former Code 1942 § 139.

16. Decisions under former Code 1942 § 143.

17. Decisions under former Code 1942 § 147.

I. DECISIONS UNDER CURRENT LAW.

1. Dishonor.

Defendant's check to plaintiff was dishonored where plaintiff presented the check to the bank on four separate occasions, and on each attempt the check was returned for insufficient funds. Bryan v. Aron, 941 So. 2d 831 (Miss. Ct. App. 2006), writ of certiorari denied en banc, sub nomine Russell v. Aron, 942 So. 2d 164, 2006 Miss. LEXIS 648 (Miss. 2006).

2-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-507.

11. In general.

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Lack of acceptance by drawee bank was not defense to action by payee against drawer to recover on dishonored draft, since UCC § 3-507 gave holder immediate right of recourse against drawer upon drawee's refusal to accept draft and since drawer engaged under UCC § 3-413 to pay draft upon dishonor. Baum v. Cotton States Mut. Ins. Co., 141 Ga. App. 636, 234 S.E.2d 178 (1977).

Bank which dishonored check upon presentment, although sufficient funds were in the account, owed no duty to holder of check, and holder's remedy was against drawer and not bank. Stewart v. Citizens & S. Nat'l Bank, 138 Ga. App. 209, 225 S.E.2d 761 (1976).

When an indorser has such knowledge or so participates in the affairs of the primary party that the indorser knows that the commercial paper will not be honored by the primary party it is not required that the holder go through the useless gesture of making a presentment and of notifying the secondary party in order to hold him liable. Makel Textiles, Inc. v. Dolly Originals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

When an indorser is the principal officer of the corporate maker and knows personally that payment will not be made by the corporation, there is no necessity for making a presentment of the note for payment and giving the indorser notice of the dishonor. Makel Textiles, Inc. v. Dolly Originals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where excuse for presentment of negotiable instrument not shown overdue instrument is not dishonored for nonpayment. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

IV. DECISIONS UNDER FORMER UCC § 75-3-508.

13. Decisions under former Code 1942 § 133.

An indorser in blank of a note before its delivery is an accommodation indorser secondarily liable thereon, and is discharged to the extent that the payee receives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from proceeds of insurance of such property against fire with loss payable to such payee. Wright v. North River Ins. Co., 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

Liability as indorser of note as collateral security for another, not having matured at indorser's death, need not be probated as claim. Sledge & Norfleet Co. v. Dye, 140 Miss. 779, 106 So. 519 (1926).

14. Decisions under former Code 1942 § 137.

Notice of dishonor, not showing note was presented at proper place, was insufficient. Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927).

15. Decisions under former Code 1942 § 139.

Notice of dishonor to indorser's administrator was not excused because indorser had no right to expect notes would be paid. Sledge & Norfleet Co. v. Dye, 151 Miss. 693, 118 So. 414 (1928).

16. Decisions under former Code 1942 § 143.

No recovery against indorser of demand paper where notice of dishonor delayed more than 60 days when not excused by reasonable diligence. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

17. Decisions under former Code 1942 § 147.

The chancery court, upon dismissal of attachment against nonresident still had jurisdiction to render a personal decree against the nonresident. Myers v. Giroir, 226 Miss. 335, 84 So. 2d 525 (1956).

§ 75-3-503. Notice of dishonor.

(a) The obligation of an indorser stated in Section 75-3-415(a) and the obligation of a drawer stated in Section 75-3-414(d) may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this section or (ii) notice of dishonor is excused under Section 75-3-504(b).

(b) Notice of dishonor may be given by any person; may be given by any commercially reasonable means, including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor.

(c) Subject to Section 75-3-504(c), with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (ii) by any other person within thirty (30) days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within thirty (30) days following the day on which dishonor occurs.

SOURCES: Former § 75-3-503: Codes, 1942, § 41A:3-503; Laws, 1966, ch. 316, § 3-503; Laws, 1992, ch. 420, § 61, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

III. DECISIONS UNDER FORMER UCC § 75-3-508.

12. In general.
13. Written notice.
14. Oral notice.
15. Timeliness of notice.
16. Certificate of protest as evidence of presentment and notice of dishonor.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. Crescent Credit Corp. v. Union Bank & Trust Co., 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. Chandler Motors, Inc. v. Dunham, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Payee of note payable at bank (treated as equivalent of draft drawn on bank under New York "Alternative A" to Code § 3-121) need not allege presentment and notice of dishonor in complaint against maker or drawer; although Code § 3-501(2) provides that unless excused, in case of drawer, notice of dishonor is necessary, failure to give such notice discharges drawer only as stated in Code § 3-502(1)(b) which becomes matter of defense to be pleaded in answer. County Restaurant & Bar Equip. Co. v. Shaw

Mechanical Contractors, 56 Misc. 2d 832 (1968).

Presentment and notice of dishonor are entirely excused when notes contain waiver by party to be charged. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

III. DECISIONS UNDER FORMER UCC § 75-3-508.

12. In general.

Notice of dishonor may be given in any reasonable manner; it may be oral or written and in any terms which identify the instrument and state that it has been dishonored. Leaderbrand v. Central State Bank, 202 Kan. 450, 450 P.2d 1 (1969).

The provisions of paragraph (3) of the instant section that "notice may be given in any reasonable manner" and that "it may be oral or written", and the provision of paragraph (4) that "Written notice is given when sent although it is not received", while couched in somewhat different language, follow, in substance the comparable provisions of the former Negotiable Instruments Law, relating to the form and manner of giving notice and the deposit of notice in the post office. Durkin v. Siegel, 340 Mass. 445, 165 N.E.2d 81 (1960).

13. Written notice.

Where (1) bank customer asked bank official, who was not a teller, how customer could get checks made payable to customer "taken care of," (2) official took checks and told another bank employee to put them in for collection and give customer receipts therefor, and (3) employee complied with such order and gave receipts to customer, bank could not successfully contend, in defense of its failure to give customer notice of dishonor of checks by bank's midnight deadline, that receipts constituted written notice of dishonor because (1) receipts were merely bank's written acknowledgment of its acceptance of checks for collection, and (2) since receipts did not indicate that checks had been dishonored, receipts did not comply with UCC § 3-508(3), which requires that written notice of dishonor must bear some terms stating the dishonor. Available Iron & Metal Co. v. First Nat'l Bank, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Notice of dishonor required by UCC § 3-508 does not require inclusion of name of holder of dishonored instrument. First-Stroudsburg Nat'l Bank v. Nixon, 53 Pa. D. & C.2d 672 (1971).

14. Oral notice.

Under UCC § 3-508(3), an oral notice of dishonor must be given in a reasonable manner and in terms which state that the instrument has been dishonored. Available Iron & Metal Co. v. First Nat'l Bank, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depositary bank where collecting bank gave depositary bank only oral notice of dishonor, where although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. Valley Bank & Trust Co. v. First Sec. Bank, 538 P.2d 298 (Utah 1975).

Payor bank was not liable to collecting bank for conversion of checks which were returned unpaid to collecting bank, notwithstanding checks were marked "Uncollected funds" rather than "Insufficient Funds" while there were sufficient funds on deposit in customer's account to pay part of checks, where officer of payor bank talked with officer of collecting bank and informed him of payor bank's intention to dishonor checks and make offset against customer's account for obligations due to payor bank, since collecting bank had ample time thereafter to inquire into specifics of dishonor; payor bank gave proper notice under UCC § 3-508(3) and its action of dishonoring checks was legal and timely under clearinghouse rule. Security Trust Co. v. First Nat'l Bank, 79 Misc. 2d 523 (1974).

A telephone call from one of the makers of a note, stating that they would not pay unless certain things were done, was sufficient notice of dishonor, because notice under this section may be given in any reasonable manner, oral or written, and in any terms which identify the instrument and state that it has been dishonored. First Pa. Banking & Trust Co. v. De Lise, 186 Pa. Super. 398, 142 A.2d 401 (1958).

15. Timeliness of notice.

In action by plaintiff customer against depositary and collecting bank for wrongfully debiting plaintiff's checking account with amount of certain dishonored checks that had apparently been forged, where plaintiff introduced evidence which might indicate that bank had dishonored some or all of such checks after its midnight deadline for taking such action under UCC § 4-211(2) and giving notice of dishonor under UCC § 3-508(2), trial court's premature entry of judgment for bank at conclusion of direct and cross-examination of plaintiff's only witness deprived plaintiff of opportunity to establish prima facie case of proper deposit of such checks and improper debit thereof, so as to shift burden to bank of going forward and showing that it had acted within reasonable time in debiting plaintiff's account without the statutorily required notice within 24 hours following day of deposit. Trading Assocs. v. Trust Co. Bank, 142 Ga. App. 229, 235 S.E.2d 661 (1977).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-508(2). Standard Premium Plan Corp. v. Wolf, 56 Misc. 2d 522 (1968).

16. Certificate of protest as evidence of presentment and notice of dishonor.

This section carries forward the provisions of § 261 of the Negotiable Instruments Law defining a protest as a certificate of dishonor made under the hand and seal of a notary public, and presence of the seal as well as the signature of the notary is essential to constitute such a notice evidence in and of itself of presentment and dishonor. A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc., 40 Misc. 2d 72 (1963).

Indorsers of a promissory note given by a corporation could not be held liable thereon without due proof of notice of its presentment and dishonor, as to which the burden of proof was on plaintiff, and a certificate of protest signed, but not sealed, by a notary public was insufficient to satisfy the statutory requirement. A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc., 40 Misc. 2d 72 (1963).

§ 75-3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

SOURCES: Former § 75-3-504: Codes, 1942, § 41A:3-504; Laws, 1966, ch. 316, § 3-504; Laws, 1992, ch. 420, § 62, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general; express waiver.
12. Countermanding, dishonoring instrument.
13. Expectation of nonacceptance.
14. Refusal to pay or accept.
15. Dishonor by nonacceptance.
16. —Applicability to various instruments.
17. —Particular actions as waiver.
18. Waiver of protest; effect.

III. DECISIONS UNDER FORMER STATUTES.

19. Decisions under former Code 1942 § 123.
20. Decisions under former Code 1942 § 150.
21. Decisions under former Code 1942 § 153.
22. Decisions under former Code 1942 § 189.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general; express waiver.

Where decedent signed two promissory notes either as co-maker or endorser, both notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

Indorser liability, absent disclaimer thereof, is secondary only because of rights of presentment and dishonor, notice of dishonor, and protest, which are specifically provided for by UCC § 3-414. However, under UCC § 3-511, such rights can be expressly waived by language on face of instrument. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Under UCC § 3-511, presentment and notice of acceleration were not required of creditor prior to acceleration of maturity of installment note upon debtor's default, where note and security agreement executed by debtor contained express waivers of presentment of note for payment, demand for payment and notice of intention to accelerate maturity. Sylvester v. Watkins, 538 S.W.2d 827 (Tex. Civ. App. 1976), ref. n.r.e. (Nov. 10, 1976).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). First New Haven Nat'l Bank v. Clarke, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. Crescent Credit Corp. v. Union Bank & Trust Co., 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

Under UCC §§ 3-415(2) and 3-511(2), holder of 7 demand promissory notes made by corporate maker was entitled to enforcement against two individual accommodation indorsers without presentment, protest or notice of dishonor, where notes provided that maker and indorsers waived presentment, protest and notice of dishonor; there was nothing which permitted accommodation indorsers to escape from effect of waiver provision, which by its express terms was applicable to indorser, merely because they were accommodation indorsers; furthermore, individual accommodation indorsers were not entitled to assert defense of usury inasmuch as it was not available defense for corporate maker of notes. Bank of Del. v. NMD Realty Co., 325 A.2d 108 (Del. Super. 1974).

Where note sued on and incorporation in complaint contained express waiver of presentment and notice, contention that complaint be dismissed for failure to allege presentment and notice of dishonor is without merit. Fett Developing Co. v. Garvin, 119 Ga. App. 569, 168 S.E.2d 212 (1969).

Where an indorsement is made underneath a waiver of notice of protest, no such notice is required and the indorser cannot object that the notice had been sent to a former address at which he no longer lived. Lizza Asphalt Constr. Co. v. Greenvale Constr. Co., 4 U.C.C. Rep. Serv. 954 (1968, NY Sup).

Where the face of the paper contains a waiver of notice of dishonor and protest, a secondary party is not released by the failure to give such notice or make protest. Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc., 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

Where promissory note stated on its face "protest waived," such waiver is binding upon all parties, and therefore fact that note was not presented for payment, was not protested for nonpayment, and no notice of protest or nonpayment was given to the indorser does not constitute defense to action to recover on such note. Gerrity Co. v. Padalino, 51 Misc. 2d 928 (1966).

12. Countermanding, dishonoring instrument.

Where buyer of automobile resold it to third party, received check in payment therefor, original seller took possession of automobile from third party and third party notified buyer he was canceling transaction, although ownership of car passed to third party at time payment was accepted and car was delivered, such payment was conditional under UCC § 2-511(3) and, although check was never presented for payment, third party in effect dishonored check and countermanded payment when he notified buyer he was canceling transaction; under UCC § 2-507(2), third party's right to retain or dispose of automobile was conditional upon his making payment due and thus, when his check was dishonored, buyer had right to reclaim automobile by maintaining action in trover against original owner. Lawrence v. Graham, 29 Md. App. 422, 349 A.2d 271 (1975).

Where defendant-indorser of note directed his bank not to honor note, neither he nor his corporation was entitled to notice of protest. Franklin Nat'l Bank v. Eurez Constr. Corp., 60 Misc. 2d 499 (1969).

The indorser of an instrument cannot require notice of dishonor when he had countermanded payment of the instrument. General Bronze Corp. v. Barclay Towers, Inc., 4 U.C.C. Rep. Serv. 765 (1967, NY Sup).

A bank accepting a check from the payee for a deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

13. Expectation of nonacceptance.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son, since drawee bank was not authorized to pay check under UCC § 4-405 more than 10 days after drawer's death, if it knew of fact of death, presentment to bank was entirely excused under UCC § 3-511(2) as futile gesture and provision for direct payment merely restated result prescribed by law in accord with UCC §§ 3-413(2) and 3-507(1)(b). Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

Where single corporate officer acted on behalf of corporation as maker of note and on behalf of himself as indorser thereof, it cannot be concluded that dishonor which he made on behalf of corporation was not known to him individually as endorser or that request for extension and forebearance which he made on behalf of corporation was not known to him individually; therefore, he waived second and formal and useless presentment and notice and protest to himself individually as endorser. Trafalgar Square, Ltd. v. Green, 57 Pa. D. & C.2d 166 (1972).

When an indorser is the principal officer of the corporate maker and knows personally that payment will not be made by the corporation, there is no necessity for making a presentment of the note for payment and giving the indorser notice of the dishonor. Makel Textiles, Inc. v. Dolly Originals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

Notice of dishonor is unnecessary where the party to whom notice would be given already has knowledge of the matters to which the notice would relate by virtue of his being an officer or a stockholder of the primary party. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

When an indorser is a person who is an officer of the primary party there is no need to notify him of a default by the primary party since he has such knowledge by virtue of his office. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. Refusal to pay or accept.

Conduct of makers and indorsers of note constituted waiver of any defect in presentment where both makers and indorsers requested extensions of time for payment of note. Wiener v. Van Winkle, 273 Cal. App. 2d 774 (2d Dist. 1969).

15. Dishonor by nonacceptance.

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. Goodman v. Norman Bank of Commerce, 551 P.2d 661 (Okla. Ct. App. 1976).

Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted; reference to dishonor of a "draft" "by nonacceptance" includes the dishonor of a check by nonpayment. Leaderbrand v. Central State Bank, 202 Kan. 450, 450 P.2d 1 (1969).

16. —Applicability to various instruments.

Payor bank which did not return before its midnight deadline check that was represented to it for payment, after such check had previously been dishonored by payor bank for insufficient funds, was not excused by UCC § 3-511(4) for not meeting midnight deadline because excuse rule of UCC § 3-511(4) applies only to time items, such as drafts, which have been dishonored by nonacceptance, and does not apply to demand items, such as checks, which have been dishonored by nonpayment. Furthermore, since check was not being held for protest, payor bank under UCC § 4-301(1) could revoke provisional settlement for check only by returning it before bank's midnight deadline and not by giving notice of check's dishonor. Therefore, even assuming that further notice of dishonor when check was re-presented was necessary to make drawer liable on check or to revive drawer's liability on underlying contract of sale, provisions of UCC § 3-511(4) excusing notice of dishonor could not apply because notice of dishonor was not available to payor bank as means of revoking its provisional settlement for check. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

Subsection (4) of Code 1942, § 41A:3-511 [UCC § 3-511] had no application to documentary drafts dishonored by nonpayment. Wiley v. Peoples Bank & Trust Co., 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

17. —Particular actions as waiver.

Statement in letter which accompanied notes that the notes could be repaid in stock of the borrowing corporation and further stating that the letter was not intended to create any legally binding obligation between the parties did not constitute an abandonment of the lender's right to present the notes for payment. Thor Dahl Indus. Corp. v. Christianssen, 70 Misc. 2d 684 (1972).

18. Waiver of protest; effect.

Under the provisions of subsecs. (5) and (6) a waiver of protest is also a waiver of presentment and of notice of dishonor, and where the waiver is embodied in the note itself it is binding on all parties, and where note stated on its face that protest was waived, failure of holder to present it for payment, protest nonpayment, and give notice of protest were no defenses to its payment. Gerrity Co. v. Padalino, 51 Misc. 2d 928 (1966).

III. DECISIONS UNDER FORMER STATUTES.

19. Decisions under former Code 1942 § 123.

Where excuse for presentment of negotiable instrument not shown overdue instrument is not dishonored for nonpayment. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

20. Decisions under former Code 1942 § 150.

Notice of dishonor or defect therein held waived by accommodation endorser, after maturity of note, promising to pay. Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927).

21. Decisions under former Code 1942 § 153.

Notice of dishonor is not dispensed with, where holder falls short of showing reasonable diligence on his own part in endeavoring to locate the maker, although two others, on independent missions, were unable to locate the maker. Carter v. Jennings, 134 Miss. 263, 98 So. 687 (1924).

22. Decisions under former Code 1942 § 189.

Where a bank to which a draft had been forwarded for collection had acted in good faith and with due diligence in performance of its duties as collecting agent, and being unable to pay the draft because the drawee had not accepted it, the bank was at liberty to apply the drawee's available funds to the payment of debt to the bank. Thack v. First Nat'l Bank & Trust Co., 206 F.2d 180, 39 A.L.R.2d 1290 (5th Cir. 1953).

§ 75-3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor;

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice-consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

SOURCES: Former § 75-3-505: Codes, 1942, § 41A:3-505; Laws, 1966, ch. 316, § 3-505; Laws, 1992, ch. 420, § 63, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-509, 75-3-510.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. Decisions under former Code 1942 § 194.

13. Decisions under former Code 1942 § 199.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-509, 75-3-510.

11. In general.

Under UCC § 3-510(b) and state statute governing admissibility of entries on records made in regular course of business, notation "account closed" on check deposited by customer of bank in customer's account was admissible as primary evidence to establish fact stated in such notation. Serve v. First Nat'l Bank, 143 Ga. App. 239, 237 S.E.2d 719 (1977).

Purported stamp or writing of drawee bank on check or accompanying paper stating that acceptance or payment has been refused because there is "no account" is admissible in evidence and creates presumption of dishonor. State v. Young, 203 Kan. 296, 454 P.2d 724 (1969).

The requirement of the New York Negotiable Instruments Law that a protest must be made under the hand and seal of a notary making it is carried over by the instant provision of the Uniform Commercial Code defining a protest as a certificate of dishonor made under the hand and seal of a notary public. A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc., 40 Misc. 2d 72 (1963).

A notary's unsealed certificate of dishonor is insufficient to establish due mailing thereof to indorsers, and so is the notary's testimony where he did not, himself, attend to the mailing. A. & L. Trading

Co. v. Herald Square Bakers & Caterers, Inc., 40 Misc. 2d 72 (1963).

III. DECISIONS UNDER FORMER STATUTES.

12. Decisions under former Code 1942 § 194.

Notice of dishonor, not showing note was presented at proper place, was insufficient. Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927).

13. Decisions under former Code 1942 § 199.

A defendant may not complain of errors made by the court in a co-defendant's case, so long as they do not affect his own rights. Canton Broiler Farms, Inc. v. Warren, 214 So. 2d 671 (Miss. 1968).

§§ 75-3-506 through 75-3-511. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-506. [Codes, 1942, § 41A:3-506; Laws, 1966, ch. 316, § 3-506]
§ 75-3-507. [Codes, 1942, § 41A:3-507; Laws, 1966, ch. 316, § 3-507]
§ 75-3-508. [Codes, 1942, § 41A:3-508; Laws, 1966, ch. 316, § 3-508]
§ 75-3-509. [Codes, 1942, § 41A:3-509; Laws, 1966, ch. 316, § 3-509]
§ 75-3-510. [Codes, 1942, § 41A:3-510; Laws, 1966, ch. 316, § 3-510]
§ 75-3-511. [Codes, 1942, § 41A:3-511; Laws, 1966, ch. 316, § 3-511]

Editor's Note — Former § 75-3-506 stated the time allowed for acceptance or payment of instruments.

Former § 75-3-507 dealt with dishonor of instruments, holders' rights of recourse, and terms in instruments allowing re-presentment of them.

Former § 75-3-508 concerned notice of dishonor of instruments.

Former § 75-3-509 dealt with protest, and noting for protest, of instruments.

Former § 75-3-510 concerned evidence as to dishonor and notice of dishonor with respect to instruments.

Former § 75-3-511 dealt with waived or excused presentment, protest, or notice of dishonor or delay therein, with respect to instruments.

PART 6.

DISCHARGE AND PAYMENT.

SEC.
75-3-601. Discharge and effect of discharge.
75-3-602. Payment.
75-3-603. Tender of payment.
75-3-604. Discharge by cancellation or renunciation.
75-3-605. Discharge of secondary obligors.
75-3-606. Repealed.

§ 75-3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this chapter or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

SOURCES: Former § 75-3-601: Codes, 1942, § 41A:3-601; Laws, 1966, ch. 316, § 3-601; Laws, 1992, ch. 420, § 64, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-601.

11. In general; payment as discharge.
12. Tender of payment.
13. Fraudulent and material alteration.
14. Discharge under simple contract rules.
15. Party reacquires instrument in own right.
16. Practice and procedure.
17. Unexcused delay; disclosure.

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions under former Code 1942 § 160.
19. Decisions under former Code 1942 § 161.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-601.

11. In general; payment as discharge.

Where bank accepted third party's payment of note, note was marked "Paid" and delivered to third party who later gave it to maker, maker's obligation to bank was effectively discharged under UCC §§ 3-601 and 3-603, notwithstanding third party paid note with funds that he was not authorized to use, especially in light of fact that bank knew source of third party's funds and maker did not. Jacobson v. Federal Deposit Ins. Corp., 407 F. Supp. 821 (S.D. Iowa 1976).

Payment of note by maker discharged liability of maker and all endorsers on note. Cipra v. Seeger, 215 Kan. 951, 529 P.2d 130 (1974).

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

12. Tender of payment.

Indorser of negotiable instrument is entitled to protection afforded him by any specific security for payment of debt that principal debtor may have given holder or which holder may have acquired by operation of law, and if holder releases or voluntarily destroys any part of such security, indorser is discharged to extent that such security would have gone to pay debt (holding that while subordination of second mortgage to rank of third mortgage impaired subrogation rights of indorsers of handnote sued on, indorsers were not thereby discharged from liability on such note under UCC § 3-601(1)(d) and § 3-606(1)(b), since they completely failed to show extent of any prejudice from such subordination and also failed to show that collateral had been released without their knowledge or consent). Poynot v. J & T Devs., Inc., 355 So. 2d 1052 (La. App. 1978).

13. Fraudulent and material alteration.

Where (1) maker of promissory notes negotiated them on strength of guarantor's guaranty thereof and willingness to pledge two certificates of deposit as security for their repayment, and (2) notes contained request by maker for credit life insurance which bank that made loan to maker did not obtain, court held that guarantor was not discharged as surety on notes under UCC § 3-601(1)(f), dealing with discharge of party from liability on an instrument by fraudulent and material alteration of instrument, since bank's failure to procure life insurance for maker did not constitute alteration of terms of notes but was, at most, a violation of bank's obligations thereunder (also holding that although bank's failure to procure the life insurance impaired collateral within meaning of UCC § 3-606(1)(b), guarantor expressly consented to such impairment when he signed guaranty agreement). DeKalb County Bank v. Haldi, 146 Ga. App. 257, 246 S.E.2d 116 (1978).

Where several banks orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company got possession of checks when banks were reimbursed, not at later time when company, upon discovering forged indorsements on checks, paid grower-payee; and by getting grower-payee to indorse check already in company's possession, and which had ceased to be negotiable instrument, company did not relinquish its claim against bank for wrongfully paying check bearing forged indorsement; to the contrary, company's conduct went to prove damage which company suffered from bank's paying to another its check intended for grower, but of which grower never became holder. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

14. Discharge under simple contract rules.

Under UCC § 3-601(2), oral agreement to discharge party to negotiable instrument may be given effect where such agreement is supported by consideration. Brannon v. Langston, 375 So. 2d 231 (Miss. 1979).

The import of UCC § 3-601(2) is that in situations other than those listed in UCC § 3-601(1), the law providing for the discharge of a surety or guarantor of a simple contract for the payment of money applies equally to a surety or guarantor of a negotiable instrument. Therefore, a novation that would discharge a surety or guarantor of a simple contract for the payment of money will also discharge a surety or guarantor of a negotiable instrument. Sewell v. Akins, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Where holder orally agreed to cancel two promissory notes in return for transfer and lease of maker's bowling alley business, notes were discharged by oral agreement under UCC § 3-601(2); since there was valuable consideration involved in oral agreement between holder and maker, such agreement was not required to be in writing in order to discharge two prior promissory notes; it is only when there is gratuitous discharge that UCC § 3-605(1), requiring a writing, applies. Brunswick Corp. v. Briscoe, 523 S.W.2d 115 (Mo. Ct. App. 1975).

Maker of note was not discharged by novation, although maker claimed that he had entered into new agreement with payee's representative to effect that payee would release him if he returned certain merchandise, where maker admitted that payee's representative stated he had no authority to enter into such agreement and where there was no evidence that payee had ratified agreement. Ampex Corp. v. Appel Media, Inc., 374 F. Supp. 1114 (W.D. Pa. 1974).

Where undisputed evidence shows that farm was sold by foreclosure to someone other than lessor, there was an affirmative showing of failure of consideration on lessor's part under lease and a corresponding discharge of lessee's obligation to pay rent thereunder, which in turn discharged lessee from liability on notes which had been executed in sum of yearly rental and assigned or transferred to bank. Tallahassee Bank & Trust Co. v. Raines, 125 Ga. App. 263, 187 S.E.2d 320 (1972).

15. Party reacquires instrument in own right.

Where amendments to real-estate sales contract and note were executed as part of same transaction and amendments expressly stated that time for closing transaction was being extended in consideration of note, parties to contract thus expressed intent to close sale at later date under same conditions and stipulations contained in contract. Thus, seller's failure to comply with condition precedent to buyer's obligation to close sale constituted failure of consideration for note, which was signed by buyer and buyer's comaker, and furnished comaker with complete defense as matter of law, since UCC § 3-

601(2) codifies principle that failure of consideration on underlying contract discharges liability on note. Hunter v. McLelland, 143 Ga. App. 746, 240 S.E.2d 153 (1977).

Under UCC § 3-601(3)(a), liability of all parties on note was discharged when maker reacquired note in his own right by taking assignment thereof. Best Fertilizers of Arizona, Inc. v. Burns, 116 Ariz. 492, 570 P.2d 179 (1977).

Promissory notes, executed by closely held corporation and endorsed by stockholders of corporation, were not discharged when they were acquired from payee bank by executor of deceased endorser; among other things, instruments were acquired by executor, not by deceased endorser, and executor was, therefore, not prior party to instrument. Eikel v. Bristow Corp., 529 S.W.2d 795 (Tex. Civ. App. 1975).

When the face of the paper authorizes extensions and declares that the secondary party shall not be released thereby, and extension does not release a secondary party. Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc., 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

16. Practice and procedure.

In action by holder of promissory note executed by principal maker and two comakers against comakers, where note was stamped with legend indicating it had been paid but where there was scrawl in ink across area bearing stamped legend, case would be remanded for determination whether note had been discharged by payment or cancellation; under UCC § 3-603 maker of note does not lose right to assert that note was discharged by payment merely by leaving it in possession of payee when paying it; holder was not entitled to recover on note if it had been paid, but was entitled to recover if the stamp thereon was unintentional or made under mistake or without authority of holder. Household Fin. Co. v. Watson, 522 S.W.2d 111 (Mo. Ct. App. 1975).

In action to recover on notes, under UCC § 3-119 and 3-601, question of fact existed as to whether parties entered into written contract which relieved defendants of personal liability on notes, or whether parties performed under oral contract to same effect. DiLeo v. Werb, 50 A.D.2d 570 (2d Dep't 1975).

17. Unexcused delay; disclosure.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Where accommodation indorser, on May 1, 1970, indorsed check drawn on out-of-state bank which was made payable to drawer; where cashing bank cashed check for payee drawer and initiated collection on check through another bank on same day; where almost 90 days later, on July 28, 1970, collection bank notified cashing bank that check had been dishonored with notice stating "original lost in transit-account closed"; where on July 29, 1970, cashing bank debited accommodation indorser's account for amount of check and notified her in writing of payor bank's dishonor of check; and where record did not disclose which of several banks involved in collection process had lost check or delayed taking action with regard to it, (1) accommodation indorser's liability was discharged under UCC § 3-502(1)(a) because notice of check's dishonor was unreasonably delayed by failure of unknown bank in collection process to observe its midnight deadline under UCC § 4-104(h) for giving such notice, and (2) cashing bank could look for recovery from such unknown bank which had committed violation of law involved. Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. Chandler Motors, Inc. v. Dunham, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Under UCC §§ 3-502 and 3-503(2), obligation of drawer of dishonored uncertified checks was not per se discharged by payee's presentment of checks for payment more than 30 days after date of issue, where record did not show that drawee bank had become insolvent during delay, thereby depriving drawer of funds with which to cover checks. Grist v. Osgood, 90 Nev. 165, 521 P.2d 368 (1974).

Assignee's delay of almost 18 months in presenting note to endorsers was unreasonable and endorsers were discharged thereon. Hane v. Exten, 255 Md. 668, 259 A.2d 290 (1969).

Complaint in action against maker of note was not insufficient for failure to allege presentment and dishonor. County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors, 56 Misc. 2d 832 (1968).

Where notes were past due when endorsed and no presentment for payment was made within reasonable time after endorsement, endorser was not bound. Sledge & Norfleet Co. v. Dye, 151 Miss. 693, 118 So. 414 (1928).

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions under former Code 1942 § 160.

Mere possession alone by obligors under a note and deed of trust of the written evidence of their indebtedness was insufficient to meet the burden of proof resting on them to show payment, for the reasons that they had not thereby sufficiently proved, under paragraph (4) of this section, any act which would discharge a simple contract for the payment of money, and that they did not become the holders of the note at or after its maturity in their own rights, within the meaning of paragraph (5) of this section, since their complaint alleged, and their proof disclosed, that they came into possession of the note prior to its maturity, at a time when they were under no obligation to pay it. McCaslin v. Willis, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

Where the holder of accommodation paper, collateral for the note of the accommodated party, extended the time of payment of the latter's note by a binding agreement, without the knowledge or consent of the maker of the accommodation paper, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker could not be held liable, notwithstanding that the accommodated party gave a cross note to the accommodation maker, since the latter was merely given to evidence the transaction. Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).

Oral release of liability on promissory note for consideration was valid without instrument being delivered up to persons liable thereon. Hazlehurst Oil Mill & Fertilizer Co. v. Booze, 160 Miss. 136, 133 So. 120 (1931).

Statute providing for compromise with one of several joint and several debtors is not repealed by Negotiable Instruments Law. Branton v. O.B. Crittenden & Co., 145 Miss. 531, 111 So. 150 (1927).

Statute providing how an instrument is discharged held not conflicting with statute as to release of one of several joint and several debtors; where one of two joint and several debtors has been released, obligation must be credited with half thereof; plea setting up offset because of release of one of two joint and several debtors is good as partial defense. Branton v. O.B. Crittenden & Co., 145 Miss. 531, 111 So. 150 (1927).

Breach of maker's contemporary agreement no defense against bona fide holder. Despres, Bridges & Noel v. Hough Drug Co., 123 Miss. 598, 86 So. 359 (1920).

One signing note as surety held not estopped to claim benefit of payee bank's agreement that such note should be paid out of first money paid in by maker, because he was silent when after payment made to bank it pledged the note as collateral. Davidson v. Plant, 113 Miss. 482, 74 So. 328 (1917).

Bank's agreement that such note should be paid out of first money paid in by maker held valid. Davidson v. Plant, 113 Miss. 482, 74 So. 328 (1917).

Notes held released by execution and acceptance of new notes in renewal of obligation with a new principal obligor. Davidson v. Plant, 113 Miss. 482, 74 So. 328 (1917).

19. Decisions under former Code 1942 § 161.

Stipulation over accommodation indorser's signature held not waiver of right to discharge from liability on creditor's failure to commence proceedings after notice. First Nat'l Bank v. Rau, 146 Miss. 520, 112 So. 688 (1927).

RESEARCH REFERENCES

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-602. Payment.

(a) Subject to subsection (e), an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument.

(b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf of a party obliged to pay the note to a person that formerly was entitled to enforce the note only if at the time of the payment the party obliged to pay has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. A notification is adequate only if it is signed by the transferor or the transferee; reasonably identifies the transferred note; and provides an address at which payments subsequently are to be made. Upon request made in a record, a transferee shall seasonably furnish reasonable proof that the note has been transferred.

(c) Subject to subsection (e), to the extent of a payment under subsections (a) and (b), the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 75-3-306 by another person.

(d) Subject to subsection (e), a transferee, or any party that has acquired rights in the instrument directly or indirectly from a transferee, including any such party that has rights as a holder in due course, is deemed to have notice of any payment that is made under subsection (b) after the date that the note is transferred to the transferee but before the party obliged to pay the note receives adequate notification of the transfer.

(e) The obligation of a party to pay the instrument is not discharged under subsections (a) through (d) if:

(1) A claim to the instrument under Section 75-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

(f) As used in this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

SOURCES: Former § 75-3-602: Codes, 1942, § 41A:3-602; Laws, 1966, ch. 316, § 3-602; Laws, 1992, ch. 420, § 65; Laws, 2010, ch. 506, § 24, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general.

Where decedent signed two promissory notes either as co-maker or endorser, both notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death, two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

§ 75-3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

SOURCES: Former § 75-3-603: Codes, 1942, § 41A:3-603; Laws, 1966, ch. 316, § 3-603; Laws, 1992, ch. 420, § 66, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-603.

11. In general; what constitutes payment.
12. Payment as discharge.
13. —Discharge of accommodation maker.
14. —Effect of discharge.
15. Extent of discharge.
16. Drawer's liability.
17. Rights of transferee.
18. Practice and procedure.

III. DECISIONS UNDER FORMER UCC § 75-3-604.

19. Tender of payment.

IV. DECISIONS UNDER FORMER STATUTES.

20. Decisions under former Code 1942 § 129.
21. Decisions under former Code 1942 § 160.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-603.

11. In general; what constitutes payment.

Where check is made payable to two payees jointly, only proper negotiation, that is, endorsement by both, results in payment contemplated by Code § 3-603; and collecting bank which negotiated check with endorsement of only one of two joint payees received only such right as its transferor had, and its credit to transferor's account did not operate as discharge of its liability on check. Feldman Constr. Co. v. Union Bank, 28 Cal. App. 3d 731 (2d Dist. 1972).

Maker gave check to payee each month; after check cleared payee again loaned maker same sum in exchange for another note; held, new note was not intended as renewal note but as new and independent note. National Bank of Commerce v. Green, 1 Wash. App. 713, 463 P.2d 187 (1969).

12. Payment as discharge.

Where bank accepted third party's payment of note, note was marked "Paid" and delivered to third party who later gave it to maker, maker's obligation to bank was effectively discharged under UCC §§ 3-601 and 3-603, notwithstanding third party paid note with funds that he was not authorized to use, especially in light of fact that bank knew source of third party's funds and maker did not. Jacobson v. Federal Deposit Ins. Corp., 407 F. Supp. 821 (S.D. Iowa 1976).

In action by holder of promissory note to recover payment from maker, maker could not assert defense that holder as trustee of trust estate acquired notes from trust estate in violation of statute; under UCC § 3-306(d), maker could not defend on basis of holder's alleged violation of his fiduciary duty to beneficiary. Furthermore, maker's payment of debt, even though made with knowledge of holder's wrongful acquisition of notes, would discharge maker's liability thereon under UCC § 3-603(1). Harvey v. Casebeer, 531 S.W.2d 206 (Tex. Civ. App. 1975).

Payment of note by maker discharged liability of maker and all endorsers on note. Cipra v. Seeger, 215 Kan. 951, 529 P.2d 130 (1974).

13. —Discharge of accommodation maker.

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. Marcus v. Wilson, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

Payment of a note by the accommodation maker did not discharge the obligation which it evidenced, nor did it extinguish the lien of the real estate mortgage by which it was secured. Simson v. Bilderbeck, Inc., 76 N.M. 667, 417 P.2d 803 (1966).

14. —Effect of discharge.

In action by Federal Deposit Insurance Corporation (FDIC), as owner-holder of note purchased from bank for which FDIC was receiver, to recover on such note from defendant maker, (1) defendant under UCC § 3-306(d) could not assert FDIC's allegedly illegal acquisition of note as defense, since only the bank in receivership or such bank's shareholders had standing to assert such defense, and (2) if defendant satisfied note by payment to FDIC, he would not risk double liability on note in event bank's sale of note to FDIC should be set aside, but would be discharged from liability under UCC § 3-603(1) (applying South Carolina law; also holding that oral agreement to extend time for paying note was unenforceable under non-UCC statute of frauds). FDIC v. Moore, 448 F. Supp. 493 (D.C.S.C. 1978).

In suit by purchaser of promissory note to recover thereon, where note was executed in favor of bank by defendants husband and wife as comakers together with defendant husband's partner and partner's wife to consolidate partnership's outstanding notes; where defendant's partner and partner's wife, who were not parties to suit, executed mortgage to bank on two parcels of realty owned by them as security for such note; where first parcel was subject to prior mortgage of third party and judgment of foreclosure had been entered thereon; where plaintiff at suggestion of partner's wife became sole owner of first parcel by redeeming it and having it conveyed to her by means of a "straw" transaction; where plaintiff found buyer for first parcel, buyer's title search discovered bank's mortgage thereon and note for which such mortgage was given, plaintiff purchased note in order to convey marketable title to buyer, note was indorsed by bank to plaintiff, mortgage on first parcel was released and discharged, mortgage on second parcel was assigned to plaintiff, and plaintiff sold first parcel for substantial profit, (1) under UCC § 3-302, plaintiff was holder in due course of note in suit and could recover thereon unless defendants could establish defense to note; (2) only defense raised by defendants was alleged satisfaction of such note on theory that plaintiff had been made whole by virtue of her resale of collateral property (first parcel); and (3) such defense failed since defendants, although benefiting from proceeds of note to extent of their interest in partnership, had never had any title or interest in the collateral property (first parcel), were not subjected in any way to double liability on note, and their liability thereon would be completely discharged under UCC § 3-603 by paying note (stating that any further dispute about liability in the case would have to be settled in separate action). Ryan v. Stearns, 135 Vt. 385, 376 A.2d 728 (1977), but see Licursi v. Sweeney, 156 Vt. 418, 594 A.2d 396 (1991).

15. Extent of discharge.

Where defendants executed promissory note which was delivered to bank, note was guaranteed by Small Business Administration, defendants defaulted on payments under note, and note was assigned in accord with guarantee agreement to S.B.A., which made payment to bank of 50 per cent of unpaid balance of note, fact that government did not own entire equitable interest in note did not prevent government from maintaining suit on note as its legal owner and holder. United States v. Sellers, 487 F.2d 1268 (5th Cir. Tex. 1973).

16. Drawer's liability.

Where checks are returned by the drawee bank to the customer's bank, the latter is the holder as to such checks which it has in its possession but if by inadvertence it returns any of them to the payee, the latter may receive a settlement payment from the drawer of the check which will discharge the checks and bar a subsequent suit by the customer's bank against the drawer, and this is so without regard to the good faith or absence of notice of any defect in title. Chenowith v. Bank of Dardanelle, 243 Ark. 310, 419 S.W.2d 792 (1967).

Although the drawer of a check has the right to stop payment of it at any time before it has been certified or paid by the drawee, the drawer remains liable, unless he has a defense which is good against the holder. Tidwell v. Bank of Tifton, 115 Ga. App. 555, 155 S.E.2d 451 (1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

17. Rights of transferee.

Assignee of guarantor of promissory note, who paid amount due on note and concurrently received note from payee with payee's assignment endorsed thereon, was entitled to sue payor on instrument; UCC § 3-415 and UCC § 3-603 give both accommodation party and stranger to instrument, respectively, rights of recourse on instrument against payor after they have paid or satisfied note. Collection Control Bureau v. Weiss, 50 Cal. App. 3d 865 (2d Dist. 1975).

18. Practice and procedure.

In action on note against two comakers summary judgment against one comaker was improper where other comaker made unrebutted allegation of payment; under UCC § 3-603(2), comaker's defense of payment inured to benefit of other comaker. Barnes v. York, 526 S.W.2d 404 (Mo. Ct. App. 1975).

In action by holder of promissory note executed by principal maker and two comakers against comakers, where note was stamped with legend indicating it had been paid but where there was scrawl in ink across area bearing stamped legend, case would be remanded for determination whether note had been discharged by payment or cancellation; under UCC § 3-603 maker of note does not lose right to assert that note was discharged by payment merely by leaving it in possession of payee when paying it; holder was not entitled to recover on note if it had been paid, but was entitled to recover if the stamp thereon was unintentional or made under mistake or without authority of holder. Household Fin. Co. v. Watson, 522 S.W.2d 111 (Mo. Ct. App. 1975).

Where corporation paid note signed by corporation president but not by corporation, corporation acquired rights of transferee and could not enforce note against maker until date when it could have been enforced by transferor; so that corporation as account debtor was not entitled to set-off, since it had had notification of assignment of accounts more than 3 months before claim against assignor on note accrued. Commercial Sav. Bank v. G & J Wood Prods. Co., 46 Mich. App. 133, 207 N.W.2d 401 (1973).

III. DECISIONS UNDER FORMER UCC § 75-3-604.

19. Tender of payment.

Accrual of interest on amount due under promissory note was not stopped under UCC § 3-604(1) by tender of less than full amount owed before the amount tendered was due to be paid. Kohlenberg v. American Plumbing Supply Co., 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

Trial court improperly denied motion to open judgment by confession on promissory note, where maker alleged that he had notice of assignment, he tendered payment to assignees when due, and was ready, willing and able to pay instrument. Lewis v. Palmer, 20 Ill. App. 3d 237, 313 N.E.2d 656 (4th Dist. 1974).

When a party makes a tender of full payment to the holder of a promissory note when or after it is due, he is discharged to the extent of all subsequent liability for interest, costs, and attorney's fees. Still v. Plaza Marina Com. Corp., 21 Cal. App. 3d 378 (5th Dist. 1971).

Reasonable counsel fees incurred by holder of promissory note in successful defense of appeal from judgment for holder may recover from obligor who has expressly agreed to pay such fees in case of default, even though such appeal was prosecuted by co-defendant of obligor; obligor's submission to judgment and his non-participation in prior appeal are not enough to terminate his liability for cost of additional legal services-statute requires tender of full payment. Washington Trust Co. v. Fatone, 106 R.I. 168, 256 A.2d 490 (1969).

IV. DECISIONS UNDER FORMER STATUTES.

20. Decisions under former Code 1942 § 129.

Notice given by maker of negotiable notes to payee, of intent to make prepayment, pursuant to provision of mortgage giving privilege to debtor of maturing notes by notice to payee, held not to constitute payee agent of holder of notes to receive payment, where holder was ignorant of giving of notice. Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 107, 87 A.L.R. 347 (1933).

Payment to bank of notes made payable there but not left with bank for collection or presented there is not satisfaction, and maker must see that payment is made to legal holder. Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 107, 87 A.L.R. 347 (1933).

Maker is charged with notice of defect in title of person in possession of note without endorsement by payee; maker must determine at his peril whether person in possession of note without endorsement by payee is authorized to receive payment. Anderson v. Wm. R. Moore Dry Goods Co., 152 Miss. 312, 119 So. 914 (1929).

"Holder" as used in law relating to payment of negotiable instruments, means person legally in possession thereof, either by indorsement or delivery. Anderson v. Wm. R. Moore Dry Goods Co., 152 Miss. 312, 119 So. 914 (1929).

Payment before maturity binding only on parties receiving payment and privies; duty of maker to require production before making payment. Union Station Trust Co. v. Bostick, 133 Miss. 627, 98 So. 105 (1923).

21. Decisions under former Code 1942 § 160.

No presumption that a promissory note has been paid arises from the maker's possession where acquired prior to its maturity. McCaslin v. Willis, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

In action to cancel as cloud on title a deed of trust securing a note claimed by the maker to have been paid in the payee's lifetime, brought against his administratrix, in which the maker introduced testimony as to statements by the payee indicating that the note had been paid, privilege attaching to communications between attorney and client did not make the payee's attorney, who also was the trustee named in the deed of trust, incompetent to testify on behalf of the administratrix as to payee's subsequent instructions in the event that a foreclosure should become necessary. McCaslin v. Willis, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

Where makers of notes, in support of their claim that it had been paid, introduced testimony as to statement of deceased payee against interest that the note was paid, the other party should be permitted to prove contrary statements made by the decedent at a later time. McCaslin v. Willis, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

§ 75-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement.

(c) In this section, "signed," with respect to a record that is not a writing, includes the attachment to or logical association with the record of an electronic symbol, sound, or process with the present intent to adopt or accept the record.

SOURCES: Former § 75-3-604: Codes, 1942, § 41A:3-604; Laws, 1966, ch. 316, § 3-604; Laws, 1992, ch. 420, § 67; Laws, 2010, ch. 506, § 25, eff from and after July 1, 2010.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-605.

11. In general.
12. Cancellation or renunciation on face of instrument.
13. —Intent.
14. Written renunciation; delivery.
15. Surrender of instrument.
16. Oral cancellation or renunciation.
17. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-605.

11. In general.

UCC § 3-605(1)(b) allows the holder of an instrument to discharge a party thereto to the extent of the holder's interest in the instrument. However, under UCC § 3-116(b), the holder cannot discharge all interests under an instrument that is payable, but not in the alternative, to both himself and another party (holding that UCC § 3-605(1)(b) does not prohibit person from discharging his interest in an instrument by a renunciation contained in a properly executed will). Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

12. Cancellation or renunciation on face of instrument.

In action by accommodation maker against accommodated party to recover amount paid to holder of note, where holder, after such payment, stamped "paid" on note and delivered it to accommodation maker, (1) under UCC § 3-605(1)(a), holder's indorsement on face of note (by stamping "paid" on note) discharged accommodation maker's liability thereon, (2) such indorsement did not discharge accommodated party's obligation to accommodation maker, since such discharge was not apparent on face of instrument, (3) holder's delivery of note to accommodation maker also did not discharge accommodated party's obligation to accommodation maker under UCC § 3-605(1)(b), (4) under UCC § 3-415(5), accommodation maker, on paying note, had right of recourse thereon against accommodated party, and (5) since accommodation maker was entitled to proceed on the written instrument, trial court erred in applying three-year statute of limitations applicable to actions on oral contracts. Payne v. Payne, 219 Va. 12, 245 S.E.2d 133 (1978).

13. —Intent.

Since UCC § 3-605(1)(a) provides that holder of instrument can discharge debtor by intentionally cancelling instrument, borrower's obligation to lender on note was not extinguished where note, by clerical error, was stamped paid and returned to borrower (holding that lender's writing off borrower's account as bad debt was mere internal accounting procedure that also did not discharge debtor). First Galesburg Nat'l Bank & Trust Co. v. Martin, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (3d Dist. 1978).

Where promissory note was unintentionally marked paid by creditor's employees and sent to debtors, debtors were not discharged from liability under UCC § 3-605(1)(b), since surrender of instrument was not accompanied by creditor's intent to discharge. Peoples Bank of S.C., Inc. v. Robinson, 272 S.C. 155, 249 S.E.2d 784 (1978).

14. Written renunciation; delivery.

UCC § 3-605(1)(b) does not require that delivery of writing renouncing holder's rights in instrument must occur contemporaneously with written renunciation itself, or that such delivery must occur during payee's lifetime (holding that all requirements for effective renunciation of deceased holder's interest in certain promissory notes, as to which holder's will directed forgiveness of makers' liability for payment, were met when will was admitted to probate). Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978).

Even though it was payee's intention to release balance due on note if maker survived payee, failure to deliver written release could not be rectified merely by noting abortive attempt to carry out intention. Greene v. Cotton, 457 S.W.2d 493 (Ky. 1970).

15. Surrender of instrument.

Where husband and wife executed promissory note payable to husband's uncle, note was secured by deed of trust on makers' home, and uncle subsequently delivered note to makers, telling them that they should pay him as long as he lived but that after he was gone the home would be theirs, there was sufficient evidence to show that payee renounced his rights by surrendering instrument to parties to be discharged as contemplated by UCC § 3-605. First Nat'l Bank v. Cobler, 215 Va. 852, 213 S.E.2d 800, 96 A.L.R.3d 1137 (1975).

Instrument providing "I will surrender my notes in the amount of $8,500 to John F. Kennedy College" and signed by payee did not indicate outright renunciation of payee's rights under notes, rather, it appeared to refer to UCC § 3-605(1)(b) regarding discharge by surrender of notes; viewed in this light, instrument was unenforceable promise, made without consideration, to surrender notes at some future time and, without actual surrender of notes, they were not discharged. Gorham v. John F. Kennedy College, Inc., 191 Neb. 790, 217 N.W.2d 919 (1974).

16. Oral cancellation or renunciation.

Where holder orally agreed to cancel two promissory notes in return for transfer and lease of maker's bowling alley business, notes were discharged by oral agreement under UCC § 3-601(2); since there was valuable consideration involved in oral agreement between holder and maker, such agreement was not required to be in writing in order to discharge two prior promissory notes; it is only when there is gratuitous discharge that UCC § 3-605(1), requiring a writing, applies. Brunswick Corp. v. Briscoe, 523 S.W.2d 115 (Mo. Ct. App. 1975).

Where defendant signed promissory note payable to her stepfather, now deceased, loan funds came from joint bank account of her mother and stepfather, although funds derived from mother, and defendant alleged cancellation of obligation by mother prior to her death, summary judgment was properly granted to step-father's executor in action on note since depositions established that alleged cancellation by mother was oral and that check for loan was signed by stepfather as drawer; promissory note may not be effectively canceled by simple oral statement. Community Nat'l Bank & Trust Co. v. Gold, 45 A.D.2d 947 (1st Dep't 1974), aff'd, 37 N.Y.2d 831, 378 N.Y.S.2d 29, 340 N.E.2d 465 (1975).

The instant section was referred to in actions upon promissory notes under the prior law, in connection with the plaintiff's contention that an oral release of the notes would not extinguish the notes. Sherman v. Koufman, 349 Mass. 606, 211 N.E.2d 220 (1965).

17. Other matters.

Where debtor executed new note consolidating amounts owed creditor under several prior notes and, in action on new note following default thereon, defended liability on ground that creditor had not delivered prior notes to debtor, and where creditor's affidavit stated that prior notes had been cancelled and that debtor was not liable on any of them, court held that creditor, under UCC § 3-605(1)(b), effectively renounced its rights under prior notes and that such renunciation would constitute effective defense for debtor in any later action on prior notes. Farmers & Merchants State Bank v. Lloyd, 99 Idaho 416, 582 P.2d 1094 (1978).

Evidence that no specific representations were made to maker of note that he would be relieved of his obligation to bank that held note and that third person would be substituted in his stead, although there was evidence that some understanding had been reached with bank whereby bank would be afforded right to intercept proceeds of maker's stock sale to third person and to deduct amount of note from such funds, did not establish defense of renunciation under UCC § 3-605. Russell v. Northeast Bank, 527 S.W.2d 783 (Tex. Civ. App. 1975), ref. n.r.e. (Jan. 7, 1976).

Bank that issued cashiers' check which was purchased by corporation and made payable to it and plaintiff, a third party, was liable to plaintiff where it allowed corporation to return cashiers' check without plaintiff's indorsement and issued two new cashiers' checks payable to corporation only; although bank would have been justified in relying on presumption of continued ownership of check by corporation, absent any unusual circumstances, there were unusual circumstances in present case sufficient to raise duty of inquiry where, inter alia, bank refused to issue original $25,000 cashiers' check to corporation as drawer-purchaser until plaintiff's earnest money check for $25,000, which was deposited in corporation's account, had cleared, corporation at that time had balance of only $13,000 in its account, and, when plaintiff's $25,000 check cleared, bank issued $25,000 cashiers' check payable to plaintiff and corporation; where president of corporation returned cashiers' check for $25,000 about one month later, notified bank that it had not been used for intended purpose, and requested two new cashiers' checks (one for $15,000 and one for $10,000) payable only to corporation, and, at bank's request, president wrote "not used for purpose issued" on reverse side of $25,000 cashiers' check; where plaintiff, a joint payee, did not indorse cashiers' check for $25,000; and where bank failed to make any inquiry and issued $15,000 and $10,000 cashiers' checks payable to corporation only, as requested, and thereby made possible conversion by corporation of $25,000 of plaintiff's money. Gillespie v. Riley Mgt. Corp., 59 Ill. 2d 211, 319 N.E.2d 753 (1974).

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

Word "renounce," in Negotiable Instruments Law providing renunciation must be in writing unless instrument is delivered up, means release without consideration. Hazlehurst Oil Mill & Fertilizer Co. v. Booze, 160 Miss. 136, 133 So. 120 (1931).

Oral release of liability on promissory note for consideration was valid without instrument being delivered up to persons liable thereon. Hazlehurst Oil Mill & Fertilizer Co. v. Booze, 160 Miss. 136, 133 So. 120 (1931).

RESEARCH REFERENCES

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-605. Discharge of secondary obligors.

(a) If a person entitled to enforce an instrument releases the obligation of a principal obligor in whole or in part, and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the release preserve the secondary obligor's recourse, the principal obligor is discharged, to the extent of the release, from any other duties to the secondary obligor under this article.

(2) Unless the terms of the release provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor, the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument. If the instrument is a check and the obligation of the secondary obligor is based on an indorsement of the check, the secondary obligor is discharged without regard to the language or circumstances of the discharge or other release.

(3) If the secondary obligor is not discharged under paragraph (2), the secondary obligor is discharged to the extent of the value of the consideration for the release, and to the extent that the release would otherwise cause the secondary obligor a loss.

(b) If a person entitled to enforce an instrument grants a principal obligor an extension of the time at which one or more payments are due on the instrument and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected. Unless the terms of the extension preserve the secondary obligor's recourse, the extension correspondingly extends the time for performance of any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged to the extent that the extension would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may perform its obligations to a person entitled to enforce the instrument as if the time for payment had not been extended or, unless the terms of the extension provide that the person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor as if the time for payment had not been extended, treat the time for performance of its obligations as having been extended correspondingly.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to a modification of the obligation of a principal obligor other than a complete or partial release or an extension of the due date and another party to the instrument is a secondary obligor with respect to the obligation of that principal obligor, the following rules apply:

(1) Any obligations of the principal obligor to the secondary obligor with respect to any previous payment by the secondary obligor are not affected.

The modification correspondingly modifies any other duties owed to the secondary obligor by the principal obligor under this article.

(2) The secondary obligor is discharged from any unperformed portion of its obligation to the extent that the modification would otherwise cause the secondary obligor a loss.

(3) To the extent that the secondary obligor is not discharged under paragraph (2), the secondary obligor may satisfy its obligation on the instrument as if the modification had not occurred, or treat its obligation on the instrument as having been modified correspondingly.

(d) If the obligation of a principal obligor is secured by an interest in collateral, another party to the instrument is a secondary obligor with respect to that obligation, and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of the secondary obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent the value of the interest is reduced to an amount less than the amount of the recourse of the secondary obligor, or the reduction in value of the interest causes an increase in the amount by which the amount of the recourse exceeds the value of the interest. For purposes of this subsection, impairing the value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral, release of collateral without substitution of collateral of equal value or equivalent reduction of the underlying obligation, failure to perform a duty to preserve the value of collateral owed, under Article 9 or other law, to a debtor or other person secondarily liable, and failure to comply with applicable law in disposing of or otherwise enforcing the interest in collateral.

(e) A secondary obligor is not discharged under subsection (a)(3), (b), (c), or (d) unless the person entitled to enforce the instrument knows that the person is a secondary obligor or has notice under Section 75-3-419(c) that the instrument was signed for accommodation.

(f) A secondary obligor is not discharged under this section if the secondary obligor consents to the event or conduct that is the basis of the discharge, or the instrument or a separate agreement of the party provides for waiver of discharge under this section specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral. Unless the circumstances indicate otherwise, consent by the principal obligor to an act that would lead to a discharge under this section constitutes consent to that act by the secondary obligor if the secondary obligor controls the principal obligor or deals with the person entitled to enforce the instrument on behalf of the principal obligor.

(g) A release or extension preserves a secondary obligor's recourse if the terms of the release or extension provide that:

(1) The person entitled to enforce the instrument retains the right to enforce the instrument against the secondary obligor; and

(2) The recourse of the secondary obligor continues as if the release or extension had not been granted.

(h) Except as otherwise provided in subsection (i), a secondary obligor asserting discharge under this section has the burden of persuasion both with respect to the occurrence of the acts alleged to harm the secondary obligor and loss or prejudice caused by those acts.

(i) If the secondary obligor demonstrates prejudice caused by an impairment of its recourse, and the circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable, it is presumed that the act impairing recourse caused a loss or impairment equal to the liability of the secondary obligor on the instrument. In that event, the burden of persuasion as to any lesser amount of the loss is on the person entitled to enforce the instrument.

SOURCES: Former § 75-3-605: Codes, 1942, § 41A:3-605; Laws, 1966, ch. 316, § 3-605; Laws, 1992, ch. 420, § 68; Laws, 2010, ch. 506, § 26, eff from and after July 1, 2010.

JUDICIAL DECISIONS

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III. DECISIONS UNDER FORMER STATUTES.

23. In general.

I. DECISIONS UNDER CURRENT LAW.

1. Discharge not appropriate.

In a case involving a dispute over loans for three trucks, a borrower's liability as the maker was unconditional under Miss. Code Ann. § 75-3-412; therefore, a trial court erred by entering a partial equitable judgment in his favor when it determined that he was not responsible for the balance of a loan that was still outstanding based on a car dealer's fraud. Trustmark Nat'l Bank v. Barnard, 930 So. 2d 1281 (Miss. Ct. App. 2006).

2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-606.

11. In general.

This section does not impose duty upon mortgagee, in mortgage covering real estate collateral, who is not in possession of real estate, to look after, care for, maintain and upkeep same, because to do so would have chilling effect on business. West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241 (Miss. 1986).

This section recognizes that release of one guarantor does not release another when release is made with consent of latter; specific agreement at time of execution of note as to liability notwithstanding release of any other guarantor is equivalent to such consent and is binding. Rauch v. First Nat'l Bank, 244 Ark. 941, 428 S.W.2d 89 (1968).

It is immaterial whether or not the surety is compensated in applying § 3-606. Philco Fin. Co. v. Patton, 248 Or. 310, 432 P.2d 686 (1967).

The fact that a second commercial paper is executed for the original debt does not in itself discharge the original paper. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

12. Applicability.

In action by payee against guarantors of promissory note, where guaranties sued on expressly provided that each guaranty applied to renewals of note, that payee could change or renew the original credit, and that payee could release any one or more of the guarantors without notice or demand and without affecting guarantors' liability, guarantors were not released or discharged from liability by UCC § 3-118(f) and UCC § 3-606(1)(a), since these sections of the Uniform Commercial Code apply only to negotiable instruments and do not apply to guaranty contracts, which are not negotiable. First Nat'l Bank v. Energy Equities Inc., 91 N.M. 11, 569 P.2d 421 (Ct. App. 1977).

Although term "any party" as used in UCC § 3-606 was intended to include parties who sign negotiable instruments ostensibly as makers but who are in fact sureties or accommodation makers, provisions of § 3-606(1)(b) do not apply to comakers; thus, defense of impairment of collateral under § 3-606 was not available to individuals who cosigned corporate note where they executed note as comakers rather than as accommodation parties. Wohlhuter v. St. Charles Lumber & Fuel Co., 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

13. Party to instrument.

Where purchaser of airplane executed chattel mortgage and promissory note in favor of bank, guarantors executed guarantee and bank failed to record chattel mortgage with federal aviation authority for more than two years: guarantors were not "[parties] to the instrument" within meaning of UCC § 3-606, since guarantee, signed by guarantors, was not negotiable instrument and promissory note in question did not incorporate or even make reference to guarantee. National Bank v. Alford, 65 Mich. App. 634, 237 N.W.2d 592 (1975).

Phrase, "any party to the instrument," as used in UCC § 3-606 embraces parties to instrument in addition to drawers and indorsers if they are in position of known surety, but maker of note secured by mortgage does not become surety following transfer of mortgaged property and assumption of debt by another; thus, in action by holder of note secured by mortgage to recover deficiency following default in payment and foreclosure sale, where mortgaged premises had been sold to assuming grantee, discharge benefits of UCC § 3-606 were not available to maker. Commerce Union Bank v. May, 503 S.W.2d 112 (Tenn. 1973).

In action by bank, as payee of notes executed by used car purchasers, against used car dealer to recover unpaid balance due on notes after purchasers defaulted, where dealer had signed notes on back but was not otherwise party to instrument: (1) dealer's signature constituted indorsement of note under UCC § 3-402; (2) since indorsement was not in chain of title, dealer was accommodation indorser under UCC § 3-415 and, since bank took notes with knowledge that he was accommodation indorser, dealer's liability was that of surety; (3) as such, dealer was entitled to such defenses to liability on notes as were afforded to sureties by statute, including UCC § 3-606. First Nat'l Bank v. Hargrove, 503 S.W.2d 856 (Tex. Civ. App. 1973).

The term "any parts to an instrument" is broad enough to include all makers and indorsers. Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968).

Where a corporate note was executed by its president who endorsed it personally, subsequent agreements extending the time of payment signed by the president only in his corporate capacity were not effective to release him from his personal liability as endorser. London Leasing Corp. v. Interfina, Inc., 53 Misc. 2d 657 (1967).

14. Discharge of surety.

Plaintiff bank's failure to perfect its security interest in certain inventory and equipment of defendants, makers of two promissory notes delivered to plaintiff, unjustifiably impaired the collateral (Uniform Commercial Code, § 3-606) and pro tanto discharged the defendants as accommodation parties; although the fine print of the provisions in the notes on which the plaintiff relied to excuse its failure to secure the collateral did not render those provisions unenforceable since the print is not illegible and the defendants could be expected to understand the provisions in the notes, the creditor's failure to file a lien resulting in a loss of collateral pro tanto discharges the surety, unless excused by clear and unequivocal language in the agreement between the parties. Plaintiff's failure to properly file the financing statement was not relieved by the consent of the defendants, since a release of collateral, which defendants had consented to in the notes, is not equated with the failure to file a lien, and the provisions in the notes that no omission to do any act not requested by the obligors shall be deemed a failure to exercise reasonable care and that the bank shall not be deemed to waive any of its rights or remedies unless in writing and signed are directed toward a waiver of the plaintiff's rights, not the performance of an obligation of the plaintiff owing to the defendants. Additionally, although defendants could have filed the financing statement themselves, the creditor has an obligation to preserve the value and validity of the lien of collateral, and defendants could well have assumed that plaintiff would file properly; as between plaintiff and defendants, the loss for failure to file should fall on the party whose conduct was primarily responsible for the incidence of the loss. Executive Bank v. Tighe, 66 A.D.2d 70 (2d Dep't 1978).

Where (1) maker of promissory notes negotiated them on strength of guarantor's guaranty thereof and willingness to pledge two certificates of deposit as security for their repayment, and (2) notes contained request by maker for credit life insurance which bank that made loan to maker did not obtain, court held that guarantor was not discharged as surety on notes under UCC § 3-601(1)(f), dealing with discharge of party from liability on an instrument by fraudulent and material alteration of instrument, since bank's failure to procure life insurance for maker did not constitute alteration of terms of notes but was, at most, a violation of bank's obligations thereunder (also holding that although bank's failure to procure the life insurance impaired collateral within meaning of UCC § 3-606(1)(b), guarantor expressly consented to such impairment when he signed guaranty agreement). DeKalb County Bank v. Haldi, 146 Ga. App. 257, 246 S.E.2d 116 (1978).

Contention of guarantor of note that he was discharged from liability under UCC § 3-606(1)(a) - providing that party to instrument is discharged from liability if holder releases certain other parties without such party's consent-because signature of coguarantor was forged was not sustainable, since holder's failure to insure genuineness of signatures on note did not constitute release of party whose signature was forged or agreement by holder not to sue such party. Residential Indus. Loan Co. v. Brown, 559 F.2d 438 (5th Cir. Ga. 1977).

An agreement by the holder of a note to suspend the right to enforce for 113 days, 21 days longer than the period of the original note, was an extension beyond that authorized by UCC § 3-118(f) and when made without the consent of the endorser discharges the endorser under UCC § 3-606(1)(a). Citizens State Bank v. Beermann Bros. Dehy, 188 Neb. 597, 198 N.W.2d 458 (1972).

Under the Code, an accommodation party is released by an extension granted a secondary party in the absence of an effective reservation of rights against him. Parnes v. Celia's, Inc., 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

15. Discharge of original parties.

Notwithstanding that technically there remained on paper sufficient realty-collateral to secure the loan, the holder of a promissory note unreasonably impaired the value of realty-security so as to release the original maker when he subsequently executed an agreement subordinating his right to payment, released a part of the realty-security in exchange for partial payment of note's principal, and allowed an increase in the interest rate. Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986).

Where (1) law partnership, prior to dissolution, borrowed money by means of unsecured note that was executed by all three partners, (2) after dissolution of partnership and default on note, renewal note was executed and signed by all partners, (3) thereafter, all subsequent renewal notes were signed only by one partner, and (4) issue was whether last renewal note so signed was binding on all partners or only on partner who signed such note, court held that under UCC

§ 3-606(1)(a), acceptance by lender (plaintiff) of renewal notes signed only by one partner without knowledge and consent of other partners, even if executed by signing partner on behalf of partnership, discharged nonsigning partners, since under the statute, "any party to the instrument" (including party primarily liable as well as one secondarily liable) would be discharged under such circumstances. United Counties Trust Co. v. Podvey, 160 N.J. Super. 244, 389 A.2d 515 (L. Div. 1978).

Husband, who was comaker with wife of promissory note secured by automobile owned by wife, was not discharged under UCC § 3-606(1)(a) by note holder's release of collateral to wife where husband failed to show that he had right of contribution or recourse against wife in event he was compelled to pay note. Beneficial Fin. Co. v. Husner, 82 Misc. 2d 550 (1975).

Where sole stockholders of corporation signed promissory note in both personal and corporate capacity, loan was important to preservation of their interest in corporation and note contained clause stating that all signers were principals, individuals signed note in capacity of comakers and knowingly incurred personal liability; accordingly, defenses enumerated in UCC § 3-606 and, in particular, defense that there was unjustifiable impairment of collateral, was not available to them. Wohlhuter v. St. Charles Lumber & Fuel Co., 25 Ill. App. 3d 812, 323 N.E.2d 134 (2d Dist. 1975), aff'd, 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

Where bank held partnership note and where two or three days before note was due bank was informed that one partner was buying other partner's interest in partnership and was assuming all liabilities of business and that withdrawing partner did not want note extended and would not sign renewal note, evidence that bank twice accepted payment of interest from continuing partner after note was due did not establish that bank made enforceable promise not to sue continuing partner and, thus, withdrawing partner was not discharged under UCC § 3-606. Glover v. National Bank of Commerce, 258 Ark. 771, 529 S.W.2d 333 (1975).

In action on promissory note against husband and wife as comakers in which plaintiffs entered into joint stipulation dismissing with prejudice claim against husband after he received discharge in bankruptcy, such dismissal by plaintiffs of their action against husband did not operate to discharge wife under UCC § 3-606 because any judgment taken against husband on indebtedness already discharged in bankruptcy would have been rendered null and void under Bankruptcy Act. Wirth v. Heavey, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Payee renounced his rights to $2,000 of $10,000 note by letter to maker of note stating that it was payee's "understanding" that $2,000 was to be applied against debt of third party to maker and that in exchange third party would pay payee $2,000. Ferguson v. D.S.A. Inc., 430 S.W.2d 553 (Tex. Civ. App. 1968).

This section, discharging "any party to the instrument" for impairment of recourse or of collateral without such party's consent, is broad enough to include all makers and endorsers; whether party seeking relief is accommodation endorser is immaterial. Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968).

The execution of a refinancing modification and extension agreement does not in itself discharge the parties to the original note. A.J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

16. Impairment of collateral.

Notwithstanding that technically there remained on paper sufficient realty-collateral to secure the loan, the holder of a promissory note unreasonably impaired the value of realty-security so as to release the original maker when he subsequently executed an agreement subordinating his right to payment, released a part of the realty-security in exchange for partial payment of note's principal, and allowed an increase in the interest rate. Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986).

A holder of a promissory note is not at liberty to dispose of the collateral as he sees fit to the detriment of a nonprotected party, and then expect the nonprotected party to make up the difference between the impaired collateral and the debt. Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986).

Bank's assignment of partnership note to corporation in consideration for execution of corporation note to bank while retaining deed of trust which is collateral for partnership note does not impermissibly impair collateral where deed of trust is still in full force and effect and may be foreclosed at proper time and where if corporation pays note to bank it will be entitled to assignment of deed of trust by bank. Smith & Hitt Constr. Co. v. Fowler, 466 So. 2d 896 (Miss. 1985).

In an action by a bank against the endorser of two promissory notes executed by the corporate maker of whom the endorser was secretary and treasurer, the trial court erred in failing to direct a verdict for the endorser where the bank neglected to file its security interest with the office of the secretary of state as required by § 75-9-401(c) even though the collateral agreement included all furniture, appliances and fixtures owned by the maker and where the bank thereby discharged the endorser by impairing the collateral as provided in § 75-3-606(1)(b) (repealed). Huey v. Port Gibson Bank, 390 So. 2d 1005 (Miss. 1980).

Under UCC § 3-606(1)(b), the unjustifiable impairment of collateral for the instrument must be without the consent of the party claiming discharge on the instrument. Accordingly, an accommodation party cannot successfully claim discharge on a note under UCC § 3-606(1)(b) where the note specifically provided that the holder of the instrument could surrender any collateral therefor without affecting the accommodation party's liability (where secured party surrendered collateral for note by failing to perfect its security interest). Haney v. Deposit Guar. Nat'l Bank, 362 So. 2d 1250 (Miss. 1978).

Availability of defense of impairment of collateral under UCC § 3-606(1)(b) is not limited to accommodation party, but is expressly made available to any party to the instrument. Mikanis Trading Corp. v. Block, 59 A.D.2d 689 (1st Dep't 1977).

Bank was not entitled to recover against endorser of two promissory notes where bank breached its duty to endorser when it released collateral under security agreement securing notes without knowledge or consent of endorser and where value of collateral released by bank was sufficient to satisfy outstanding indebtedness represented by notes which endorser had endorsed. Guida v. Exchange Nat'l Bank, 308 So. 2d 148 (Fla. App. 1975).

Where automobile dealer assigned and indorsed contract of sale and note to bank, together with insurance policy which was itself collateral for note, and bank failed to replace policy after it was canceled, or to notify dealer of policy's cancellation, bank impaired collateral under UCC § 3-606(1)(b) and thus discharged dealer's indorsement. Arlington Bank & Trust v. Nowell Motors, Inc., 511 S.W.2d 415 (Tex. Civ. App. 1974).

In suit by automobile dealership against bank to recover funds paid bank under assigned and indorsed contract of sale when purchaser of vehicle failed to pay in accordance with provisions of note, automobile dealership was entitled to discharge on its indorsement under UCC § 3-606(a)(2) where bank violated contractual duty to preserve insurance policy which was collateral for note by failing to replace policy which had been canceled. Arlington Bank & Trust v. Nowell Motors, Inc., 511 S.W.2d 415 (Tex. Civ. App. 1974).

Plaintiff's failure to file financing statement in accordance with Article 9 of Code rendered his security interest in collateral subordinate to that of Trustee in Bankruptcy, and produced unjustifiable impairment of collateral, discharging defendants from obligation as personal guarantors of indebtedness on chattel mortgage notes. First Bank & Trust Co. v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1st Dist. 1973).

Car salesman, who had taken chattel mortgage as security for payment of note but failed or neglected to file mortgage, leaving accommodation maker of note unprotected, discharged accommodation maker, since chattel mortgage was impaired "collateral". Shaffer v. Davidson, 445 P.2d 13 (Wyo. 1968).

The instant section was referred to, for comparison purposes, in a case decided under the prior law in which it was held that an accommodation maker was not in the position of a surety so as to be discharged by an impairment of collateral by the payee. In the same case the court pointed out that under the Uniform Commercial Code "an accommodation party is always a surety" and that the "suretyship defenses ... are not limited to parties who are 'secondarily liable', but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so." Rose v. Homsey, 347 Mass. 259, 197 N.E.2d 603 (1964).

17. —Notice of impairment.

Guarantor of note was not discharged from liability by UCC § 3-606(1)(b), despite his contention that collateral securing underlying debt had been impaired by holder of note, where (1) alleged impairment of collateral-namely, mechanic's lien filed against realty constituting collateral-had occurred before guarantor signed guarantee of note, and (2) promisee had had nothing to do with filing of such lien. Residential Indus. Loan Co. v. Brown, 559 F.2d 438 (5th Cir. Ga. 1977).

18. Extent of discharge.

Indorser of negotiable instrument is entitled to protection afforded him by any specific security for payment of debt that principal debtor may have given holder or which holder may have acquired by operation of law, and if holder releases or voluntarily destroys any part of such security, indorser is discharged to extent that such security would have gone to pay debt (holding that while subordination of second mortgage to rank of third mortgage impaired subrogation rights of indorsers of handnote sued on, indorsers were not thereby discharged from liability on such note under UCC § 3-601(1)(d) and § 3-606(1)(b), since they completely failed to show extent of any prejudice from such subordination and also failed to show that collateral had been released without their knowledge or consent). Poynot v. J & T Devs., Inc., 355 So. 2d 1052 (La. App. 1978).

Where co-debtor who had guaranteed loans to corporation brought action against bank and other debtor alleging that bank and other debtor conspired to impair collateral for notes by disposing of inventory without proper payment arrangements, among other things, but where alleged indebtedness of corporation to bank was settled and compromised subsequent to award of damages by jury, pursuant to UCC § 3-606 co-debtor was entitled to relief only to extent impairment affected his liability on behalf of corporation and, thus, co-debtor was not entitled to affirmative relief as there was no indebtedness to bank by corporation at time of judgment. Cleburne Nat'l Bank v. Kenedco, Inc., 547 S.W.2d 67 (Tex. Civ. App. 1977), writ ref'd n.r.e., (June 22, 1977).

In action by holder against individual indorser and guarantor of promissory note in which defendant contended that he had been completely discharged from liability under UCC § 3-606(1)(b) because of holder's unjustifiable impairment of collateral by failing to perfect security interest therein, defendant was discharged from liability only to extent of such unjustifiable impairment. Thus, since extent of impairment of collateral was its value as evidenced by amount for which it was sold at public auction, plaintiff was still entitled to judgment for difference between amount outstanding on note and amount realized on sale of collateral, plus interest. Mikanis Trading Corp. v. Block, 59 A.D.2d 689 (1st Dep't 1977).

In creditor's suit against guarantor of note secured by mortgage on debtor's realty, creditor's failure to record mortgage for one year impaired both value of such collateral and also guarantor's right as surety to be subrogated to all of creditor's rights against debtor, including right to proceed against any security of debtor in creditor's hands. In such case under UCC § 3-606(1)(b), if impairment of collateral can be measured in monetary terms, monetary amount of impairment will measure extent of guarantor's discharge from liability on note. However, if monetary amount of impairment cannot be ascertained, guarantor will be discharged of all liability on instrument (remanding cause for determination of extent of impairment of collateral). Langeveld v. L.R.Z.H. Corp., 74 N.J. 45, 376 A.2d 931, 95 A.L.R.3d 949 (1977).

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collateral where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. Beneficial Fin. Co. v. Marshall, 551 P.2d 315 (Okla. Ct. App. 1976).

Payee discharged maker of note to extent of security released to one guarantor as part of transaction in which payee obtained part payment, where maker had not consented to release of security. Magnolia Homes Mfg. Corp. v. Montgomery, 451 F.2d 934 (8th Cir. Mo. 1971).

On discharge, guarantor has right to sell collateral at public or private sale without notice, but under UCC § 3-606 they could not dispose of the collateral at substantially less than its reasonable value without consent of maker of note. Magnolia Homes Mfg. Corp. v. Montgomery, 451 F.2d 934 (8th Cir. Mo. 1971).

19. Actions not impairing collateral.

Airplane seller's surety obligations under aircraft repurchase agreement, executed in connection with seller's assignment of aircraft security agreement covering purchase price of airplane to secured party, were not discharged under UCC § 3-606 by secured party's failure to repossess despite buyer's lateness in making payments and secured party's knowledge that buyer was permitting aircraft to be used for commercial purposes; UCC does not impose duties upon creditors not in possession of collateral. Commercial Credit Equip. Corp. v. Hatton, 429 F. Supp. 997 (N.D. Tex. 1977).

Note owner's unjustifiable delay in recording mortgage, which occasioned a loss of priority of mortgage, impaired value of mortgage as collateral, and diminished right of subrogation of guarantor, will discharge such guarantor to degree commensurate with impairment of said collateral measured by monetary loss, or will completely discharge such guarantor where impairment not capable of measurement by monetary loss. Langeveld v. L.R.Z.H. Corp., 74 N.J. 45, 376 A.2d 931, 95 A.L.R.3d 949 (1977).

Holder of promissory note had no obligation to demand additional collateral from defaulting debtor before he proceeded against accommodation indorser; holder's failure to record note did not constitute "unjustifiable impairment of collateral" under UCC § 3-606(1)(b), relieving accommodation indorser of any further obligation on note, since recording of promissory note would not convert it into security interest in obligor's property, absent collateral, and no collateral accompanied note in question. First State Bank v. Raiton, 377 F. Supp. 859 (E.D. Pa. 1974).

Where bank took promissory note which was signed by defendant, corporation president, in her representative capacity and also personally indorsed by her, in exchange for $5,600 corporate loan which was secured by security interest in corporation's inventory and stock in trade, evidence did not establish that bank unjustifiably impaired collateral so as to discharge defendant within meaning of UCC § 3-606(1)(b), since defendant, as corporate president, was in better position than bank to protect collateral in possession of corporation. Tampa Bay Bank v. Loveday, 526 S.W.2d 480 (Tenn. Ct. App. 1974).

Payee-holder of note, executed by corporate debtor and secured by security agreement covering equipment and fixtures, had no duty under UCC to accommodation indorsers to file security agreement to protect collateral for indorsers; nor did payee-holder's failure to file security agreement constitute unjustifiable impairment of collateral under UCC § 3-606, thus discharging accommodation indorsers upon bankruptcy of debtor, where security agreement itself provided that debtor would pay cost of filing security agreement, where payee-holder was not relying on collateral primarily but was relying on indorsers, where indorsers were interested in loan, one indorser being seller of equipment and lessor of building in which it was located and others being officers and directors of corporate debtor, and where bankruptcy of corporate debtor was voluntary, indicating that indorsers had knowledge of financial situation of maker of note. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775 (1974), cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Bank's failure to record leases and assignment did not impair collateral (assigned leases) so as to release unconditional indorser of promissory note. Hurt v. Citizens Trust Co., 128 Ga. App. 224, 196 S.E.2d 349 (1973).

20. Express reservation vitiating impairment.

In action against guarantor to recover balance due on loan, where guarantor, instead of making good on its guaranty, advised creditor to dispose of collateral over extended period of time through liquidator specially recommended by guarantor, but creditor sold collateral at public auction and net proceeds of sale were insufficient to pay off balance due on loan, guarantor could not successfully contend that because of creditor's failure to follow guarantor's recommendation for disposing of collateral, collateral was thereby unjustifiably impaired so as to discharge guarantor under UCC § 3-606(1)(b), since guarantor had waived its right to claim such discharge by consenting in its guaranty to auction sale as appropriate method for disposal of collateral. Moreover, such consent was not vitiated by creditor's alleged failure to meet its obligation under UCC § 9-504(3) to dispose of collateral in commercially reasonable manner-which obligation assertedly was not met because of creditor's failure to follow guarantor's recommendation which purportedly would have resulted in a higher price for the collateral-since UCC § 9-507(2) expressly states that fact that different method of disposition would have produced a better price does not of itself establish that sale was not made in a commercially reasonable manner. In addition, UCC § 9-507(2) also states that disposition of collateral that has been approved in any judicial proceeding shall conclusively be deemed to be commercially reasonable, and in present case sale of collateral had been approved by court in debtor's receivership proceedings, and guarantor had not attempted to restrain such sale after creditor had committed itself to an auction sale. Rhode Island Hosp. Trust Nat'l Bank v. National Health Found., 119 R.I. 823, 384 A.2d 301 (1978).

In suit on installment note and security agreement executed by defendant as note's comaker, defendant was not discharged from liability under UCC § 3-606(1)(b) on ground that plaintiff had wrongfully impaired note's collateral where instrument contained provision authorizing plaintiff to release collateral without consent of or notice to defendant and without any effect on defendant's liability. In such case, consent is deemed to have been given in advance and right to claim discharge from liability is waived. McBurnett v. National City Bank, 142 Ga. App. 505, 236 S.E.2d 179 (1977).

Where payee assigned promissory note to credit corporation with recourse and subject to agreement that credit corporation could, without notice to payee, grant extension of time for payment, where maker defaulted after several extensions of time had been granted by credit corporation, and where credit corporation sued payee for indebtedness represented by note and assignment, payee was precluded from relying on defense that credit corporation had unjustifiably impaired collateral under UCC § 3-606(1)(b) by granting extensions of time to maker since payee had given its consent to such extensions of time, without notice. Commercial Credit Equip. Corp. v. Southeastern Uni-Loader, Inc., 134 Ga. App. 156, 213 S.E.2d 536 (1975).

In action by bank on corporate notes made in connection with $100,000 corporate loan, against guarantors of those notes following maker-corporation's bankruptcy, bank's failure to perfect its security interest in corporation's liquor license did not constitute impairment of collateral sufficient to discharge sureties under UCC § 3-606(1)(b) on theory that had bank perfected, sureties, as bank's subrogees, would have prevailed over corporation's trustee in bankruptcy, where, under guaranty agreement, bank was not required to perfect or even to acquire security interests in any of corporation's property as prerequisite to guarantors' liability, guarantors had waived their right to subrogation, bank had expressly reserved right to waive and release security at any time, there was no absence of good faith on part of bank within meaning of UCC § 1-201(19), and there was nothing unreasonable in terms of guaranty agreement. American Bank of Commerce v. Covolo, 88 N.M. 405, 540 P.2d 1294 (1975).

Endorsers and guarantors of note secured by deed of trust on 2 separate properties were not discharged as guarantors by holder's release of one property as collateral, where note contained advance consent contemplated by § 3-606. Tolzman v. Gwynn, 22 Md. App. 564, 324 A.2d 179 (1974).

Guarantor-indorser of note secured by collateral was not discharged thereon by bank's failure to file financing statement where, under provisions of guaranty agreement and collateral note, guarantor consented to impairment of collateral. Greene v. Bank of Upson, 231 Ga. 287, 201 S.E.2d 463 (1973).

Even if bank disbursed funds from account without authority, such action would not have discharged guarantors under § 3-606(1)(b), where guaranty agreement and note contained provision authorizing bank to surrender or release collateral. Twisdale v. Georgia R.R. Bank & Trust Co., 129 Ga. App. 18, 198 S.E.2d 396 (1973).

Where loan for which note was given was also secured by bill of sale conveying certain furnishings and equipment, and note provided that holder might without notice surrender all or any part of collateral, temporary loan of equipment by maker to another would not effect pro tanto discharge as to guarantors of note. Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc., 346 F. Supp. 888 (S.D. Ga. 1972).

Evidence that when 1965 model automobile which was pledged as collateral for note burned, insurance company with consent of holder of note provided owner with 1966 model automobile in substitution, would support finding that collateral was not impaired by substitution so as to discharge cosigner from his obligation upon default. Hunter v. Community Loan & Inv. Corp., 127 Ga. App. 142, 193 S.E.2d 55 (1972).

Failure to file a security interest did not release endorsers of a promissory note where they had consented to a release of the collateral by the creditors. Lafayette Bank & Trust Co. v. Silver, 58 Misc. 2d 891 (1969).

Under terms of instrument in question defendant had consented to surrender or release of collateral and could not urge Code provisions regarding unjustifiable impairment of collateral, as grounds for discharge; hence, trial judge did not err in granting plaintiff's motion for summary judgment. Reeves v. Hunnicutt, 119 Ga. App. 806, 168 S.E.2d 663 (1969).

21. Express reservation; notice.

"Agreement not to execute" entered into by comaker and holder of note did not serve to discharge other comaker since agreement contained express reservation of rights against other comaker; and notification to other comaker was not prerequisite to validity of reservation of rights against comaker. Hallowell v. Turner, 95 Idaho 392, 509 P.2d 1313 (1973).

There is no requirement under the Code that notice be given an accommodation party that rights against him have been reserved when an extension of time is given the primary party. Parnes v. Celia's, Inc., 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

Indorsers upon a note given by a conditional buyer to a conditional seller were not discharged under subsection (1)(a) of this section by the creditor's assent to an assignment for benefit of creditors by the debtor, nor by the creditor's acceptance of a dividend thereunder, where the creditor made an express reservation of rights against the indorsers both in the note and in the letter of assent to the assignment. Priggen Steel Bldgs. Co. v. Parsons, 350 Mass. 62, 213 N.E.2d 252 (1966).

22. Practice and procedure.

Where bank held partnership note and where two or three days before note was due bank was informed that one partner was buying other partner's interest in partnership and was assuming all liabilities of business and that withdrawing partner did not want note extended and would not sign renewal note, evidence that bank twice accepted payment of interest from continuing partner after note was due did not establish that bank made enforceable promise not to sue continuing partner and, thus, withdrawing partner was not discharged under UCC § 3-606. Glover v. National Bank of Commerce, 258 Ark. 771, 529 S.W.2d 333 (1975).

In action by bank as holder of promissory note against corporation and two individuals who signed note: (1) failure of bank to perfect purchase money security interest in collateral given as security for note by properly filing financing statement in manner prescribed by UCC § 9-401 was unjustifiable impairment of collateral as contemplated by UCC § 3-606; (2) however, discharge of party to negotiable instrument by reason of unjustifiable impairment of collateral was defense available only to secondary and accommodation parties; (3) where it was clear from face of instrument that individual signers intended to sign note other than as endorsers but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as to capacity in which instrument was signed; and (4) evidence that loan in present case was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signor was director of bank, was sufficient to show that individual signers signed note as makers rather than accommodation parties. Peoples Bank v. Pied Piper Retreat, Inc., 158 W. Va. 170, 209 S.E.2d 573 (1974).

There was no direct evidence of value of property covered by corporate co-maker's mortgage released by payee without individual maker's consent; even assuming that generally value of mortgaged property exceeded amount of debt, it was not error for trial court to have found that individual maker had failed to prove value of security released. Christensen v. McAtee, 256 Or. 333, 473 P.2d 659 (1970).

When it is claimed that there has been a reservation of rights against an accommodation party, such reservation may be shown by a letter written by the holder to the accommodated party and other circumstances of the transaction. Parnes v. Celia's, Inc., 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

Judgment in action on note could be rendered against surety on pleadings, where surety alleged substitution of collateral by principal but failed to timely allege that substitution increased surety's risk by impairing collateral. Buffington v. Nalley Disct. Co., 117 Ga. App. 820, 162 S.E.2d 212 (1968).

Defense asserting oral agreement to forgive debt not germane since there was no written renunciation of note or surrender thereof; therefore motion to strike defense from answer, granted. Bihlmire v. Hahn, 43 F.R.D. 503 (E.D. Wis. 1967).

III. DECISIONS UNDER FORMER STATUTES.

23. In general.

Release of an unlimited indorser after judgment discharges subsequent limited indorsers. Fish Meal Co. v. Brondum, 242 Miss. 573, 135 So. 2d 825 (1961).

So long as the holder of a promissory note does not put himself in a position whereby he could not sue immediately for the amount due, an extension of the time of payment does not discharge an endorser. Barnett v. First Nat'l Bank, 201 Miss. 613, 29 So. 2d 922 (1947).

When the holder of accommodation paper extends the time of its payment by a binding agreement with the accommodated party without the knowledge or consent of the maker or indorser, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker or indorser is thereby discharged from liability. Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).

Agreement to extend time of payment must be positive, and supported by new and valuable consideration, in order to release surety. Graham v. Pepple, 132 Miss. 612, 97 So. 180, 30 A.L.R. 1278 (1923).

RESEARCH REFERENCES

Law Reviews. 1985 Mississippi Supreme Court Review — Contracts and Commercial Law. 55 Miss. L. J. 775, December, 1985.

§ 75-3-606. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

[Codes, 1942, § 41A:3-606; Laws, 1966, ch. 316, § 3-606]

Editor's Note — Former § 75-3-606 concerned discharge of a party and impairment of recourse or of collateral.

PART 7.

ADVICE OF INTERNATIONAL SIGHT DRAFT [REPEALED].

SEC.
75-3-701. Repealed.

§ 75-3-701. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

[Codes, 1942, § 41A:3-701; Laws, 1966, ch. 316, § 3-701]

Editor's Note — Former § 75-3-701 dealt with letters of advice of international sight draft.

PART 8.

MISCELLANEOUS [REPEALED].

SEC.
75-3-801 through 75-3-805. Repealed.

§§ 75-3-801 through 75-3-805. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-801. [Codes, 1942, § 41A:3-801; Laws, 1966, ch. 316, § 3-801]
§ 75-3-802. [Codes, 1942, § 41A:3-802; Laws, 1966, ch. 316, § 3-802]
§ 75-3-803. [Codes, 1942, § 41A:3-803; Laws, 1966, ch. 316, § 3-803]
§ 75-3-804. [Codes, 1942, § 41A:3-804; Laws, 1966, ch. 316, § 3-804]
§ 75-3-805. [Codes, 1942, § 41A:3-805; Laws, 1966, ch. 316, § 3-805]

Editor's Note — Former § 75-3-801 concerned drafts drawn in a set of parts.

Former § 75-3-802 stated the effect of instruments on the obligations for which such instruments were given.

Former § 75-3-803 provided for the giving of notice of litigation to third parties.

Former § 75-3-804 dealt with lost, destroyed or stolen instruments.

Former § 75-3-805 made the chapter applicable to instruments not payable to order or to bearer.

CHAPTER 4

Uniform Commercial Code—Bank Deposits and Collections

Part 1. General Provisions and Definitions....75-4-101
Part 2. Collection of Items: Depositary and Collecting Banks....75-4-201
Part 3. Collection of Items: Payor Banks....75-4-301
Part 4. Relationship Between Payor Bank and Its Customer....75-4-401
Part 5. Collection of Documentary Drafts....75-4-501

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

SEC.
75-4-101. Short title.
75-4-102. Applicability.
75-4-103. Variation by agreement; measure of damages; action constituting ordinary care.
75-4-104. Definitions and index of definitions.
75-4-105. Definitions of types of banks.
75-4-106. Payable through or payable at bank; collecting bank.
75-4-107. Separate office of bank.
75-4-108. Time of receipt of items.
75-4-109. Delays.
75-4-110. Electronic presentment.
75-4-111. Statute of limitations.

§ 75-4-101. Short title.

This chapter may be cited as Uniform Commercial Code—Bank Deposits and Collections.

SOURCES: Laws, 1942, § 41A:4-101; Laws, 1966, ch. 316, § 4-101; Laws, 1992, ch. 420, § 72, eff from and after January 1, 1993.

Cross References — Regulation of banks and banking, generally, see § 81-5-1 et seq.

Comparable Laws from other States — Alabama: Code of Ala. § 7-4-101 et seq.
Alaska: Alaska Stat. § 45.04.101 et seq.
Arizona: A.R.S. § 47-4101 et seq.
Arkansas: A.C.A. § 4-4-101 et seq.
California: Cal U Com Code § 4101 et seq.
Colorado: C.R.S. 4-4-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-4-101 et seq.
Delaware: 6 Del. C. § 4-101 et seq.
District of Columbia: D.C. Code § 28:4-101 et seq.
Florida: Fla. Stat. § 674.101 et seq.
Georgia: O.C.G.A. § 11-4-101 et seq.
Hawaii: HRS § 490:4-101 et seq.
Idaho: Idaho Code § 28-4-101 et seq.
Illinois: 810 ILCS 5/4-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-4-101 et seq.
Iowa: Iowa Code § 554.4101 et seq.

Kansas: K.S.A. § 84-4-101 et seq.
Kentucky: KRS § 355.4-101 et seq.
Louisiana: La. R.S. § 10:4-101 et seq.
Maine: 11 M.R.S. § 4-101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 4-101 et seq.
Massachusetts: ALM GL ch. 106, § 4-101 et seq.
Michigan: MCLS § 440.4101 et seq.
Minnesota: Minn. Stat. § 336.4-101 et seq.
Missouri: § 400.4-101 R.S.Mo. et seq.
Montana: 30-4-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 4-101 et seq.
Nevada: Nev. Rev. Stat. Ann. § 104.4101 et seq.
New Hampshire: RSA 382-A:4-101 et seq.
New Jersey: N.J. Stat. § 12A:4-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-4-101 et seq.
New York: NY CLS UCC § 4-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-4-101 et seq.
North Dakota: N.D. Cent. Code, § 41-04-01 et seq.
Ohio: ORC Ann. 1304.01 et seq.
Oklahoma: 12A Okl. St. § 4-101 et seq.
Oregon: ORS § 74.1010 et seq.
Pennsylvania: 13 Pa.C.S. § 4101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-4-101 et seq.
South Carolina: S.C. Code Ann. § 36-4-101 et seq.
South Dakota: S.D. Codified Laws § 57A-4-101 et seq.
Tennessee: Tenn. Code Ann. § 47-4-101 et seq.
Texas: Tex. Bus. & Com. Code § 4.101 et seq.
Utah: Utah Code Ann. § 70A-4-101 et seq.
Vermont: 9A V.S.A. § 4-101 et seq.
Virgin Islands: 11A V.I.C. § 4-101 et seq.
Virginia: Va. Code Ann. § 8.4-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.4-101 et seq.
West Virginia: W. Va. Code § 46-4-101 et seq.
Wisconsin: Wis. Stat. § 404.102 et seq.
Wyoming: Wyo. Stat. § 34.1-4-101 et seq.

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 4, dealing with bank deposits and collections. 18 A.L.R.3d 1376.

Maintenance of computer terminal in retail store for purpose of effecting transfer of funds between financial institution and its depositors as conduct of banking business by store. 73 A.L.R.3d 1282.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 640, 697, 700, 712.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 962, 963, 977, 978.

CJS. 9 C.J.S., Banks and Banking §§ 274-276, 285, 286, 296, 407.

§ 75-4-102. Applicability.

(a) To the extent that items within this chapter are also within Chapters 3 and 8, they are subject to those chapters. If there is conflict, this chapter governs Chapter 3, but Chapter 8 governs this chapter.

(b) The liability of a bank for action or non-action with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

SOURCES: Codes, 1942, § 41A:4-102; Laws, 1966, ch. 316, § 4-102; Laws, 1992, ch. 420, § 73, eff from and after January 1, 1993.

Cross References — Agreement with respect to applicable law, see §§ 75-1-301, 75-4-103.

Commercial paper, see § 75-3-101 et seq.

Provisions of division on commercial paper as subject to division on bank deposits and collections, see § 75-3-103.

Action or nonaction of collecting bank, see §§ 75-4-201 to 75-4-216.

Vicarious liability of bank for action or nonaction of subagents, see § 75-4-202.

Supply by depositary bank of missing indorsement, see § 75-4-205.

Warranties by customer or collecting bank on payment, acceptance, or transfer of item, see §§ 75-4-207, 75-4-208, 75-4-209.

When security interest of bank is subject to provisions of Chapter 9, see § 75-4-210.

Accountability of payor bank until final payment of item, see § 75-4-215.

Action or nonaction of bank which suspends payment or is affected by another bank suspending payment, see § 75-4-216.

Deferred posting; revocation of settlement and return of item, see § 75-4-301.

Payor bank's accountability for late return of item, see § 75-4-302.

Relationship between payor bank and its customer, see § 75-4-401 et seq.

Letters of credit, deferment of honor of documentary draft or demand for payment, see § 75-5-108.

Documents of title, see § 75-7-101 et seq.

Investment securities, see § 75-8-101 et seq.

When purchaser of security is charged with notice of adverse claims, see § 75-8-304.

Warranties with respect to securities, see § 75-8-306.

Secured transactions, see § 75-9-101 et seq.

Establishment of electronic terminals by banks, see § 81-5-100.

Branch banks, see § 81-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by a vendor against a collecting bank which was unable to obtain foreign exchange in United States dollars for the full amount of the proceeds of three shipments of electrical equipment which had been shipped to Santo Domingo and had been fully paid for by the vendee in Dominican pesos, summary judgment was properly granted to the defendant, since the liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located (Uniform Commercial Code, § 4-102) and defendant's ability to remit the funds had been restricted by Dominican law; moreover, defendant, as a collecting bank, neither breached its agreement with plaintiff nor failed to exercise ordinary care (Uniform Commercial Code, § 4-202) by collecting the sight drafts in Dominican pesos, since prior conduct of the parties indicated that the instructions on the sight drafts which stated that collections were to be made in United States dollars were to be construed to mean only that the ultimate remittance was to be in dollars. Douglaston Elec. Sales, Inc. v. Royal Bank of Canada, 69 A.D.2d 565 (2d Dep't 1979).

Under UCC § 4-102(2), Pennsylvania law applied to determine whether deposits held by Pennsylvania bank were owned by Pakistani bank or had been effectively expropriated for benefit of Bangladesh bank by virtue of nationalization order. Rupali Bank v. Provident Nat'l Bank, 403 F. Supp. 1285 (E.D. Pa. 1975) (applying Pennsylvania law).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depositary bank where collecting bank gave depositary bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. Valley Bank & Trust Co. v. First Sec. Bank, 538 P.2d 298 (Utah 1975).

Article 4 applies only to bank's dealing with negotiable and non-negotiable documents, and Code provision to effect that no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit measure of damages for such lack or failure did not invalidate exculpatory language of contractual agreement relating to customers' use of bank's night depository facilities. Valley Nat'l Bank v. Tang, 18 Ariz. App. 40, 499 P.2d 991 (1972).

Article 4 establishes a comprehensive scheme for simplifying and expediting bank collections; its provisions govern the more general rules wherever inconsistent. Bowling Green, Inc. v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. Mass. 1970), but see, Maine Family Fed. Credit Union v. Sun Life Assurance Co., 727 A.2d 335 (Me. 1999) (applying Massachusetts law).

Article IV governs checks and other negotiable instruments during bank collection and payment and also the relationship between a bank and its checking account depositor, but Article IV does not contain detailed provisions concerning negotiable instruments, and it depends heavily on Article III to supplement its provisions in this regard. Article III governs the rights and duties of the parties to commercial paper and in case of conflict with Article IV, the rules of Article IV control those of Article III. Leaderbrand v. Central State Bank, 202 Kan. 450, 450 P.2d 1 (1969).

Under Negotiable Instruments Law § 350-c there is no provision which protects the drawer, and there is nothing in Art 4 of the Uniform Commercial Code which alters this conclusion. Low v. Merchants Nat'l Bank & Trust Co., 24 A.D.2d 322 (3d Dep't 1966).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 523, 623-626 et seq. (applying Pennsylvania law).

16 Am. Jur. 2d, Conflict of Laws § 1 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:3 (Instruction to jury; law governing liability of bank; location of bank or of branch).

CJS. 9 C.J.S., Banks and Banking §§ 45, 46, 407 et seq.

§ 75-4-103. Variation by agreement; measure of damages; action constituting ordinary care.

(a) The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operating circulars, clearinghouse rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or non-action approved by this chapter or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this chapter, is prima facie the exercise of ordinary care.

(d) The specification or approval of certain procedures by this chapter is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith it includes any other damages the party suffered as a proximate consequence.

SOURCES: Codes, 1942, § 41A:4-103; Laws, 1966, ch. 316, § 4-103; Laws, 1992, ch. 420, § 74, eff from and after January 1, 1993.

Cross References — "Agreement," see § 75-1-201(b)(3).

Agreements varying effect of provisions of code, see § 75-1-302.

Obligation of good faith in performance or enforcement of contract or duty within code, see § 75-1-304.

"Clearinghouse," see § 75-4-104(1)(d).

Respects in which collecting banks must use ordinary care, see § 75-4-202.

JUDICIAL DECISIONS

1. In general; causation requirement.
2. Permissible variations.
3. Clearinghouse, federal rules.
4. Improper variations.
5. Effect of improper variation.
6. Measure of damages.
7. Practice and procedure.

1. In general; causation requirement.

Endorser of forged check may not shift liability for dishonor of check onto collecting bank on basis of delay by collecting bank in presenting check to drawee bank. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(8) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrong doing, back to the bank under § 4-406(3). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Even assuming collecting bank did not use ordinary care in holding sight drafts for collection beyond its midnight deadline and in failing to return unpaid drafts immediately to drawer, its conduct was not shown to be cause of drawer's loss of balance due upon unpaid invoices covered by drafts where evidence showed that drawer would have continued to make each shipment to drawee whether or not bank had returned each draft seasonably and, thus, it was drawer's extension of credit to drawee and drawee's financial condition that caused drawer's losses, not any negligence, dereliction or other conduct on bank's part. Wilhelm Foods, Inc. v. National Bank of N. Am., 388 F. Supp. 1376 (S.D.N.Y. 1974) (applying New York law).

2. Permissible variations.

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and Miss. Code Ann. § 75-4-406(f)'s one-year notice provision for unauthorized signatures could be varied by the deposit agreement. Century Constr. Co., LLC v. BancorpSouth Bank, 117 So. 3d 345 (Miss. Ct. App. 2013).

Warranties of §§ 75-3-414, 75-4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

In action by payee of check against payor bank, where (1) payee on October 21, 1976 deposited check in its account with collecting bank, (2) collecting bank forwarded check to defendant, which received it on Friday, October 22, 1976 and returned it for insufficient funds on Monday, October 25, 1976, (3) defendant on November 4, 1976 instructed payee to redeposit check, (4) on such redeposit defendant, after receiving check, held it until November 16, 1976, and then returned it again for insufficient funds, (5) in intervening period, drawer of check had made assignment for benefit of creditors, and payee received no payment on instrument, (6) payee sued to recover amount of check under UCC § 4-302(a), dealing with late return of items, and alleged that defendant had prevented it from taking other means to protect itself, and (7) defendant claimed that when payee's bank forwarded once-dishonored check with covering letter that instructed defendant to remit its cashier's check when item was paid, defendant was thus directed to hold check as long as practicable without regard to defendant's midnight deadline, court held that agreement between two banks, based upon customs and practices of banking community, whereby payor bank, upon instruction of depositary bank, holds possibly worthless check until sufficient funds are deposited to cover same, constituted agreement made pursuant to UCC § 4-103(1) which reasonably set aside payor bank's midnight deadline, thus relieving said bank of liability under UCC § 4-302(a). David Graubart, Inc. v. Bank Leumi Trust Co., 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

UCC § 4-103(1) essentially allows the parties to vary any of the provisions of Article 4 of the Uniform Commercial Code. Rapp v. Dime Sav. Bank, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Where (1) plaintiff corporation sent defendant bank executed form and corporate resolution listing plaintiff's accountant as authorized signer of checks against plaintiff's account, (2) plaintiff directed that bank statements and inquiries about account should be sent to accountant, (3) non-UCC banking law provided that notwithstanding UCC § 3-304 (dealing with purchaser's notice of claim to or defense against instrument), drawing of check by corporate agent against corporate account-either in corporation's name or in agent's name to himself as payee-and cashing of check or depositing it in agent's personal account should not constitute notice to bank of defense against or claim to check, provided that bank had on file corporation's authorization showing that agent was authorized to draw checks for limited or unlimited amount and that amount of check cashed or deposited did not exceed such amount, and (4) plaintiff's account between 1968 and 1972 signed many checks against corporation's accountant and thus converted large sums of money to his own use, court held in action to recover such sums on theory of negligence that clause in UCC § 4-103(1), providing that no agreement can disclaim bank's responsibility for its failure to exercise ordinary care, was not controlling since plaintiff, as permitted by UCC § 4-103(1), had agreed to standard by which defendant's responsibility as to checks drawn against plaintiff's account was to be measured when plaintiff filed signed authorization with bank concerning accountant's authority to draw checks, and checks drawn by accountant had not exceeded maximum limitation contained in such authorization. Allen A. Funt Prods., Inc. v. Chemical Bank, 63 A.D.2d 629 (1st Dep't 1978), aff'd, 47 N.Y.2d 741, 417 N.Y.S.2d 254, 390 N.E.2d 1178 (1979).

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). Rapp v. Dime Sav. Bank, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Agreement between bank and its depositor which did not absolve bank for its negligence or lack of good faith or ordinary care, but provided condition precedent to liability in nature of abbreviated period of limitations, was not prohibited by UCC. New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co., 41 A.D.2d 912 (1st Dep't 1973).

Article 4 applies only to bank's dealing with negotiable and non-negotiable documents, and Code provision to effect that no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit measure of damages for such lack or failure did not invalidate exculpatory language of contractual agreement relating to customers' use of bank's night depository facilities. Valley Nat'l Bank v. Tang, 18 Ariz. App. 40, 499 P.2d 991 (1972).

3. Clearinghouse, federal rules.

In action by depositor against New York bank which transferred depositor's funds to second New York bank for account of German bank which had been ordered closed shortly before transfer, defendant was not negligent in failing to invoke rights under Committee on International Banking Rule on Adjustment of Payments Made in Error, since rule only applies to errors of clerical nature. Delbrueck & Co. v. Manufacturers Hanover Trust Co., 464 F. Supp. 989 (S.D.N.Y. 1979), aff'd, 609 F.2d 1047 (2d Cir. N.Y. 1979).

In action by depositor against New York bank which transferred depositor's funds to second New York bank for account of German bank which had been ordered closed shortly before transfer, defendant was not negligent in failing to invoke rights under Rules 8 and 9 of Clearing House Interbank Payment System; Rule 8 had no application where both transferor and transferee banks were Clearing House members, and Rule 9 did not apply because there was no error in computer system itself. Delbrueck & Co. v. Manufacturers Hanover Trust Co., 464 F. Supp. 989 (S.D.N.Y. 1979), aff'd, 609 F.2d 1047 (2d Cir. N.Y. 1979).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depositary-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. Community Bank v. Federal Reserve Bank, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

A clearing house agreement may modify the effect of the Code. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

4. Improper variations.

Bank breached common-law duty to act with reasonable care when it permitted one coexecutor to withdraw funds from estate account without other coexecutor's signature in violation of both established custom and practice of banking industry and bank's own operations manual and established operating procedure. Bullis v. Security Pac. Nat'l Bank, 21 Cal. 3d 801, 582 P.2d 109, 7 A.L.R.4th 642 (1978) (noting that under California UCC § 4-103(3), "action or nonaction" by a bank "consistent ... with a general banking usage not disapproved by" Article 4 "prima facie constitutes the exercise of ordinary care," and stating, conversely, that failure of a bank to act in accordance with accepted banking practice suggests absence of due care).

Bank's conduct in blindly treating commercial paper made payable to its order as bearer paper, for sole reason that both drawer and bearer were known to bank, was manifestly unreasonable and bank could not establish reasonableness of its conduct on any theory of implied contract in light of UCC § 1-102(3) and § 4-103(1), which prevent banks from contracting away their obligation to use ordinary care in handling depositors' funds. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Since provision in customer's contract with bank which provided for waiver of any requirement of protest was subject to UCC § 4-103(1), which provides that bank cannot by agreement disclaim responsibility for its failure to exercise ordinary care, customer's waiver of protest with respect to taking up subsequently dishonored check that she had deposited in her account would not be upheld where sustaining such waiver would constitute indorsement of bank's failure to exercise ordinary care in sending customer notice of check's dishonor. Manufacturers Hanover Trust Co. v. Akpan, 91 Misc. 2d 622 (1977).

Clause in night depository agreement between bank and customer, providing that "the use of the night depository facilities shall be at the sole risk of the customer" was contrary to public policy and invalid. Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112, 350 A.2d 279 (App. Div. 1975), certification denied, 70 N.J. 518, 361 A.2d 532 (1976).

Bank could not contractually exculpate itself from consequences of its own negligence or lack of good faith in performance of any of its banking functions; thus, provision in night depository agreement purporting to absolve bank from all liability in connection with use of night depository facility, so that its customers were required to use such facility at their sole risk, was invalid. Phillips Home Furnishings, Inc. v. Continental Bank, 231 Pa. Super. 174, 331 A.2d 840 (1974), rev'd on other grounds, 467 Pa. 43, 354 A.2d 542 (1976).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

A bank cannot require its depositor to furnish an indemnity agreement as a condition to honoring its stop payment order. Central Nat'l Bank v. Gallagher, 13 Ohio App. 2d 115, 234 N.E.2d 524 (1968) (dictum).

5. Effect of improper variation.

A bank depositor who executed a "Request to Stop Payment of Check," containing a provision releasing the bank from liability in paying the check through "inadvertence, accident or oversight," could nevertheless recover the amount of the check from the bank because the agreement released the bank from liability for its negligence and was therefore void as against public policy, referring to §§ 4-103(1) and 4-407 of the Uniform Commercial Code. Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954).

6. Measure of damages.

Bank's sole obligation, absent bad faith in its handling of the matter of a teller fraudulently withdrawing money from a customer's account, is to make restitution. A bank fulfilled that obligation by promptly depositing the missing money, plus interest, to a customer's account, and the bank was not liable for punitive damages. Wise v. Valley Bank, 861 So. 2d 1029 (Miss. 2003).

Summary judgment on punitive damages issues in breach of contract action was inappropriate where the evidence was such that if the client's allegations about a particular conversation she had with the bank's branch manager were taken as true, then the branch manager's statements to the client would take on the appearance of an intentional, material misrepresentation and indicate the bank did not act in good faith in its investigation of an illegal withdrawal from the client's savings account. Wise v. Valley Bank, — So. 2d —, 2003 Miss. LEXIS 231 (Miss. May 15, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1029, 2003 Miss. LEXIS 874 (Miss. 2003).

Summary judgment against a depositor's claim for punitive damages against a bank for allowing a bank employee to steal $1500 from the depositor's savings account was inappropriate; the question of whether a bank manager acted in bad faith in investigating the depositor's claim was a question of fact for a jury to decide. Wise v. Valley Bank, 850 So. 2d 1177 (Miss. Ct. App. 2002), affirmed by an equally divided court at 2003 Miss. LEXIS 231 (Miss. May 15, 2003), reversed by 861 So. 2d 1029, 2003 Miss. LEXIS 874 (Miss. 2003) supra.

Under UCC § 4-103(5), when a bank handles an item carelessly, it is liable for damages caused by its negligence in the amount of the item, as reduced by the amount thereof that could not have been collected in any event. Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law; holding that where bank on buyer's instructions held unpaid, beyond its midnight deadline, drafts given sellers in payment for cattle, bank's negligence caused no damage because sellers could not have collected on drafts in any event).

Where (1) bank accepted checks made payable to plaintiff, which bore plaintiff's restrictive indorsement "for deposit only," and deposited them into individual account of plaintiff's employee over period of 13 months, (2) plaintiff failed to discover such diversion of funds during such 13-month period, and (3) trial court found that bank had been negligent in so accepting and depositing such checks, and that there was no evidence that plaintiff had had any contact of any kind with bank that would have induced it to handle checks in such manner, court held (1) that since plaintiff had committed no act to cause bank to accept the restrictively indorsed checks and deposit them into wrong account, plaintiff had not been guilty of negligence that proximately caused bank to handle checks in such manner, and (2) that as a result, UCC § 4-103(5), which provides that measure of damages for a bank's failure to exercise ordinary care in handling item is amount of item reduced by amount that could not have been realized by use of ordinary care, did not apply to case. O.K. Moving & Storage Co. v. Eglin Nat'l Bank, 363 So. 2d 160 (Fla. App. 1978) (reversing trial court's judgment and directing entry of judgment in favor of plaintiff for total amount of checks in suit).

When payor bank fails to return check by bank's midnight deadline, it is liable for face amount of check under UCC § 4-302, and its liability is not governed by UCC § 4-103(5), which provides that general measure of damages for failure to exercise ordinary care in handling an item is the amount of the item, less any amount which could not have been realized even by the exercise of ordinary care. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977) (stating that there is a rational basis for imposing liability on payor banks that differs from the liability imposed on collecting banks, that payor bank is only bank in the collection process that is in a position to know the actual state of the drawer's account, and that it is also the only bank in the collection process that can actually pay the check).

UCC § 4-103(5) did not apply in action by depositor against bank for conversion of depositor's Christmas club account, which was based, not on misapplication of item in bank collection process, but on common law conversion of funds which belonged to depositor. Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depositary, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. Isaacs v. Chartered New England Corp., 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Bank's negligence in not insisting on written instructions from depositor before cancelling unindorsed treasurer's check and transferring funds to another bank upon instructions contained in letter from person claiming to be agent for depositor rendered bank liable to depositor for amount of funds represented by check, but bank's conduct did not amount to bad faith and did not make bank liable for subsequent losses suffered by depositor in same investment dealing. Taylor v. Equitable Trust Co., 269 Md. 149, 304 A.2d 838 (1973).

This section cannot serve to limit the measure of damages of a bank, which contrary to the provisions of § 4-302, holds a dishonored check beyond the time limit imposed upon it. Rock Island Auction Sales, Inc. v. Empire Packing Co., 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

7. Practice and procedure.

Trial court erred by granting the bank summary judgment in a customer's lawsuit to recover damages for emotional distress stemming from an investigation of a fraudulent account withdrawal where the bank's intentional, material misrepresentation indicated it had not acted in good faith throughout its investigation and created a jury question with respect to damages. Wise v. Valley Bank, — So. 2d —, 2002 Miss. App. LEXIS 76 (Miss. Ct. App. Feb. 5, 2002), opinion withdrawn by, substituted opinion at 850 So. 2d 1177, 2002 Miss. App. LEXIS 447 (Miss. Ct. App. 2002).

In suit by cattle sellers against bank under UCC § 4-202(1) and (2) for bank's negligently holding, on corporate-cattle buyer's instructions, unpaid drafts given sellers in payment for their cattle beyond bank's midnight deadline, where evidence showed (1) that drafts were received by bank between September 20 and September 28, 1973, but were not returned to sellers' banks until October 3, 1973, when corporate buyer collapsed following failure of efforts to rescue it from insolvency, (2) that bank itself was declared insolvent on October 4, 1973 because of unsecured credit extensions to buyer, (3) that sellers were unsecured creditors of buyer, (4) that cattle had been sold to buyer in ordinary course of business before drafts arrived at bank, (5) that even with timely notice of nonpayment of drafts, sellers could not have recovered by stopping delivery of cattle or replevying them, and (6) that sellers as matter of law could not have recovered amount of drafts through liens on buyer's assets, since such assets were already subject to valid prior liens, district court properly held that there was sufficient evidence to show that bank had failed to use ordinary care in handling drafts. However, district court erred in denying bank's motion for judgment n. o. v. and in accepting sellers' contention that other evidence in case supported possibility that drafts were collectible, since that possibility was exceedingly remote and under UCC § 4-103(5), governing damages for failure to exercise ordinary care in handling items, sellers to be entitled to recover damages from bank were required to show existence of reasonable chance of collecting on drafts. Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

Although UCC § 4-404 protects a bank which pays a state check as long as it acted in good faith, it does not eliminate the requirement, imposed by UCC § 4-103(1), of ordinary care that a bank must observe in all its dealings. Thus, when a bank's actions are put in issue, it must show that it exercised the requisite degree of care with regard to its customer. Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231 (La. App. 1978) (holding, where defendant bank paid check more than three years after it had been issued, lost, and customer had placed stop order thereon, that bank had not exercised requisite degree of care toward its customer, and that under UCC § 4-103(5), customer was properly awarded face amount of such check).

In action against collecting bank by cattle dealers who had drawn sight drafts on cattle buyer through collecting bank for purchase price of cattle delivered to buyer, alleging that collecting bank was negligent in failing to return unpaid sight drafts before its midnight deadline, evidence was sufficient to establish that sight drafts were collectable and, thus, that cattle dealers were damaged by collecting bank's negligence, notwithstanding buyer corporation was insolvent at time drafts were presented for collection, where, inter alia, buyer corporation continued to operate as going concern and to pay its debt for approximately two weeks thereafter. Marcoux v. Mid-States Livestock, Inc., 429 F. Supp. 155 (N.D. Iowa 1977), aff'd, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978).

Where question of validity of provision in night depository agreement purporting to absolve bank from all liability in connection with use of depository facility was not presented to Superior Court in appeal of summary judgment in favor of bank, Superior Court exceeded bounds of proper appellate review in concluding that such provision was invalid. Phillips Home Furnishings, Inc. v. Continental Bank, 467 Pa. 43, 354 A.2d 542 (1976).

Although written notice of termination of authority to execute instruments would be desirable and even though checking account agreement between corporation and bank required revocation of signatory authority to be in form of written corporate resolution, controverted question of fact as to whether bank received oral notice of withdrawal of signatory authorization presented material issue of fact which would ordinarily preclude summary judgment, since, under UCC § 4-103, no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care, and since, under UCC § 1-103, general rule of principal and agent that notice of termination of agent's authority can be given orally was applicable in absence of specific UCC provision on point. First Piedmont Bank & Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

In a corporation's suit against a bank for recovery of amount of check which the bank received for account of the corporation which had previously closed out its account, the court held that the bank had failed to meet its statutory obligation to use ordinary care when, contrary to the unqualified written instructions of the plaintiff, it (1) seized and deposited the checks under closed account of plaintiff and (2) having deposited the checks, failed to remit all balances to the plaintiff's account in North Carolina, as instructed. The court also said that the argument could be made that under § 4-201 of the UCC, at the closing of the account, the bank no longer remained an agent of the plaintiff and for that reason alone had no authority to accept, deposit or disburse checks payable to the plaintiff. General Apparel Sales Corp. v. Chase Manhattan Bank, 321 F. Supp. 891 (S.D.N.Y. 1970).

An extension of the time for returning an item by clearing house agreement is proper since with the greater volume of checks handled by computers it is proper to recognize the necessity of providing additional time in which to make the determination to pay or not to pay after the computer phase of the banking operation has been completed. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Effect on bank depositor's rights and those of bank, or printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 930, 962-988.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:31 et seq. (variation by agreement).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:41, 4:42(General provisions and definitions; damages).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:31-4:35 (General provisions and definitions; varia-

tion by agreement).

17 Am. Jur. Proof of Facts 3d 541, Banking Negligence — Improper dishonor of Letter of Credit.

CJS. 9 C.J.S., Banks and Banking §§ 333, 434, 436-438, 417, 682.

§ 75-4-104. Definitions and index of definitions.

(a) In this chapter, unless the context otherwise requires:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.

(2) "Afternoon" means the period of a day between noon and midnight.

(3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.

(4) "Clearinghouse" means an association of banks or other payors regularly clearing items.

(5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (Section 75-8-102) or instructions for uncertificated securities (Section 75-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft.

(7) "Draft" means a draft as defined in Section 75-3-104 or an item, other than an instrument, that is an order.

(8) "Drawee" means a person ordered in a draft to make payment.

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Chapter 4A or a credit or debit card slip.

(10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.

(11) "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final.

(12) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Agreement for electronic presentment"	Section 75-4-110
"Collecting bank"	Section 75-4-105

“Depositary bank”	Section 75-4-105
“Intermediary bank”	Section 75-4-105
“Payor bank”	Section 75-4-105
“Presenting bank”	Section 75-4-105
“Presentment notice”	Section 75-4-110

(c) The following definitions in other chapters apply to this chapter:

“Acceptance”	Section 75-3-409
“Alteration”	Section 75-3-407
“Cashier’s check”	Section 75-3-104
“Certificate of deposit”	Section 75-3-104
“Certified check”	Section 75-3-409
“Check”	Section 75-3-104
“Control”	Section 75-7-106
“Holder in due course”	Section 75-3-302
“Instrument”	Section 75-3-104
“Notice of dishonor”	Section 75-3-503
“Order”	Section 75-3-103
“Ordinary care”	Section 75-3-103
“Person entitled to enforce”	Section 75-3-301
“Presentment”	Section 75-3-501
“Promise”	Section 75-3-103
“Prove”	Section 75-3-103
“Remotely created check”	Section 75-3-103
“Teller’s check”	Section 75-3-104
“Unauthorized signature”	Section 75-3-403

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:4-104; Laws, 1966, ch. 316, § 4-104; Laws, 1992, ch. 420, § 75; Laws, 1996, ch. 468, § 55; Laws, 2006, ch. 527, § 56; Laws, 2010, ch. 506, § 27, eff from and after July 1, 2010.

Editor’s Note — Laws of 1996, ch. 468, § 72, effective July 1, 1996, provides as follows:

“SECTION 72. (a) This act does not affect an action or proceeding commenced before this act takes effect.

“(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.”

Cross References — Application of certain definitions of this section to UCC provisions on funds transfers, see § 75-4A-104.

Certifying checks, see § 81-5-71.

Clearinghouses, see §§ 81-5-93, 81-5-95.

JUDICIAL DECISIONS

1. In general; acceptance.
2. Account.
3. Certificate of deposit.
4. Check.
5. Customer.
6. Draft.
7. Item.
8. Midnight deadline.
9. Notice of dishonor.
10. Properly payable.
11. Protest.
12. Secondary party.

1. In general; acceptance.

Where a bank places on the item deposited by its customer a statement indicating that it has been credited to its customer's account, such statement has the effect of an indorsement by the customer but does not make the bank subject in any way dispute between the drawer of the check and the payee. Cole v. First Nat'l Bank, 433 P.2d 837 (Wyo. 1967).

2. Account.

Under Miss. Code Ann. § 75-4-104(3) and Miss. Code Ann. § 75-9-102(29), a customer's line of credit possibly qualified as an account, but not as a deposit account; thus, where a 2002 customer agreement applied to depository accounts but not to a customer's line of credit, and a 2004 customer agreements did not contain the required specific, retroactive language in the arbitration provisions, a bank could not compel the customer to arbitrate claims of tortious breach of contract and emotional distress, alleging that the bank and an insurer failed to pay benefits under a credit disability insurance policy. AmSouth Bank v. Quimby, 963 So. 2d 1145 (Miss. 2007).

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

3. Certificate of deposit.

Certificate of deposit, which contained unconditional promise to pay certain sum of money absolutely, had all essential elements of promissory note and should be governed by same rules as promissory note with reference to creation of joint-tenancy rights therein. In re Estate of Baxter, 56 Ill. 2d 223, 306 N.E.2d 304 (1973).

4. Check.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973).

5. Customer.

In action against bank for alleged negligence in depositing and disbursing proceeds from sale of two federal timber contracts and enabling proceeds, which belonged to plaintiff, to be converted by plaintiff's former officer and such officer's confederate, where evidence showed that after his resignation, plaintiff's former officer was authorized by plaintiff to negotiate for sale of one, but not both, of such timber contracts; that such officer, in conjunction with his confederate, sold both contracts and instructed purchaser to pay cash advance to confederate's Seattle bank; that such advance was first transferred by wire to San Francisco branch of confederate's bank and then transferred by wire to account of confederate in confederate's Seattle bank; and that plaintiff's former officer and his confederate thereafter withdrew and converted most of such funds to their own use, summary judgment in favor of defendant bank, on ground that it owed no duty to plaintiff, would be affirmed because (1) plaintiff was not customer of defendant under UCC § 4-104(1)(e), (2) defendant had not agreed to collect purchaser's cash-advance checks for plaintiff, and (3) plaintiff was also not payee or indorser of such checks. Swiss Baco Skyline Logging, Inc. v. Haliewicz, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. Bank Leumi Trust Co. v. Marine Midland Bank, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Under UCC § 4-104(1)(e), president of corporation was not "customer" of bank with respect to corporation's checking account, notwithstanding he opened corporate account, determined who would draw on it and also had personal account with bank, and thus he did not have cause of action against bank under UCC § 4-402 for wrongful dishonor of checks drawn on corporate account. Farmers Bank v. Sinwellan Corp., 367 A.2d 180 (Del. 1976).

Partner who deposited check bearing forged indorsement into partnership account was liable for amount of check under warranty of title contained in UCC § 4-207(2) where partnership was customer of bank within meaning of UCC § 4-104, check was credited to partnership, and partner was liable under state law for partnership debts. Kelton Motors, Inc. v. Phoenix of Hartford Ins. Cos., 522 F.2d 728 (2d Cir. Vt. 1975) (applying Vermont law).

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

As a customer of a bank, a partnership can enter into the contractual relationship of debtor and creditor. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

Since a bank carrying an account with another bank is a "customer" within the definition of that term in subd 1(e) of this section, it may stop payment on a check drawn by it on such other bank under the procedure prescribed in UCC § 4-403. Malphrus v. Home Sav. Bank, 44 Misc. 2d 705 (1965).

6. Draft.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973).

7. Item.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) $________," and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee—and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. Horney v. Covington County Bank, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Where various banks had orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company, despite having no general deposit of money in banks, was "customer" of bank within meaning of UCC, since it had "account" with bank, though account was tallied daily, and bank had agreed to collect "items" for company, having agreed for a consideration to cash and collect company's checks. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

8. Midnight deadline.

Where customer with checking accounts at both plaintiff and defendant banks began kiting checks between such accounts and defendant, on discovering such practice, thereafter refused to honor checks drawn by customer on account with defendant, which were deposited in customer's account with plaintiff and then presented by plaintiff to defendant for payment; and where defendant continued to accept deposits by customer in account with defendant of checks drawn on customer's account with plaintiff, which checks were paid by plaintiff, in conversion action in which plaintiff sought return of funds thus accumulated in customer's account with defendant and alleged that defendant intended to apply such funds to extinguish customer's debts to defendant that would become due in future, (1) in absence of fiduciary relationship or other legal duty, defendant was not obligated to inform plaintiff that customer was kiting checks; (2) defendant had right to continue to accept for deposit checks drawn by customer on account with plaintiff, to present such checks to plaintiff for payment, and to refuse to honor checks drawn by customer on account with defendant that were deposited in account with plaintiff; (3) plaintiff was required to pay checks drawn by customer on account with it or to return such checks by midnight deadline provided by UCC § 4-104(1)(h); (4) when plaintiff paid such checks, it no longer owned funds represented thereby, and defendant thus did not convert any funds belonging to plaintiff; (5) only the customer, and not plaintiff, could complain about defendant's refusal to honor checks drawn by customer on account with defendant or defendant's applying funds accumulated in customer's account to extinguish customer's debts to defendant; and (6) defendant breached no warranty owed to plaintiff under UCC § 4-207 because all that defendant warranted, as holder of checks presented to plaintiff for payment, was that defendant had good title to such checks and that it had no knowledge that drawer's signature was unauthorized. Citizens Nat'l Bank v. First Nat'l Bank, 347 So. 2d 964 (Miss. 1977).

Where accommodation indorser, on May 1, 1970, indorsed check drawn on out-of-state bank which was made payable to drawer; where cashing bank cashed check for payee drawer and initiated collection on check through another bank on same day; where almost 90 days later, on July 28, 1970, collection bank notified cashing bank that check had been dishonored with notice stating "original lost in transit-account closed"; where on July 29, 1970, cashing bank debited accommodation indorser's account for amount of check and notified her in writing of payor bank's dishonor of check; and where record did not disclose which of several banks involved in collection process had lost check or delayed taking action with regard to it, (1) accommodation indorser's liability was discharged under UCC § 3-502(1)(a) because notice of check's dishonor was unreasonably delayed by failure of unknown bank in collection process to observe its midnight deadline under UCC § 4-104(h) for giving such notice, and (2) cashing bank could look for recovery from such unknown bank which had committed violation of law involved. Nevada State Bank v. Fischer, 93 Nev. 317, 565 P.2d 332 (1977).

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. Goodman v. Norman Bank of Commerce, 551 P.2d 661 (Okla. Ct. App. 1976).

Where payment of checks was refused for insufficient funds and defendant bank returned checks by mail through channels and wired notice of non-payment to Federal Reserve Office on day after checks were received, items were protested prior to midnight deadline as defined in Code § 4-104(1)(h). Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973) (applying Missouri law).

In an action by the payee on demand instruments returned unpaid by the payor bank, where automobile title documents accompanying the draft signed by the maker were expressly delivered against payment, the items were documentary drafts and thus exempt from the midnight deadline. Wiley v. Peoples Bank & Trust Co., 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

9. Notice of dishonor.

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depositary bank where collecting bank gave depositary bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. Valley Bank & Trust Co. v. First Sec. Bank, 538 P.2d 298 (Utah 1975).

Payor bank was not liable to collecting bank for conversion of checks which were returned unpaid to collecting bank, notwithstanding checks were marked "Uncollected funds" rather than "Insufficient Funds" while there were sufficient funds on deposit in customer's account to pay part of checks, where officer of payor bank talked with officer collecting bank and informed him of payor bank's intention to dishonor checks and make offset against customer's account for obligations due to payor bank, since collecting bank had ample time thereafter to inquire into specifics of dishonor; payor bank gave proper notice under UCC § 3-508(3) and its action of dishonoring checks was legal and timely under clearinghouse rule. Security Trust Co. v. First Nat'l Bank, 79 Misc. 2d 523 (1974).

10. Properly payable.

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973).

11. Protest.

Where payment of checks was refused for insufficient funds and defendant bank returned checks by mail through channels and wired notice of non-payment to Federal Reserve Office on day after checks were received, items were protested prior to midnight deadline as defined in Code § 4-104(1)(h). Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973) (applying Missouri law).

12. Secondary party.

In action against bank for alleged negligence in depositing and disbursing proceeds from sale of two federal timber contracts and enabling proceeds, which belonged to plaintiff, to be converted by plaintiff's former officer and such officer's confederate, where evidence showed that after his resignation, plaintiff's former officer was authorized by plaintiff to negotiate for sale of one, but not both, of such timber contracts; that such officer, in conjunction with his confederate, sold both contracts and instructed purchaser to pay cash advance to confederate's Seattle bank; that such advance was first transferred by wire to San Francisco branch of confederate's bank and then transferred by wire to account of confederate in confederate's Seattle bank; and that plaintiff's former officer and his confederate thereafter withdrew and converted most of such funds to their own use, summary judgment in favor of defendant bank, on ground that it owed no duty to plaintiff, would be affirmed because (1) plaintiff was not customer of defendant under UCC § 4-104(1)(e), (2) defendant had not agreed to collect purchaser's cash-advance checks for plaintiff, and (3) plaintiff was also not payee or indorser of such checks. Swiss Baco Skyline Logging, Inc. v. Haliewicz, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Cosignatory on joint checking account was not liable for overdraft beyond balance of joint account where cosignatory neither participated in transaction creating overdraft nor received funds as result of it. Cambridge Trust Co. v. Carney, 115 N.H. 94, 333 A.2d 442 (1975).

RESEARCH REFERENCES

ALR. Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 A.L.R.3d 714.

Banks: what is "documentary draft" under UCC Sec. 4-104(1)(f). 65 A.L.R.4th 1095.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 1-3.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 962, 969 et seq.

11 Am. Jur. 2d, Bills and Notes §§ 318-337.

50 Am. Jur. 2d, Letters of Credit § 2.

73 Am. Jur. 2d, Statutes § 214 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:4-4:15 (General provisions and definitions).

CJS. 9 C.J.S., Banks and Banking §§ 1, 2, 681, 684, 708.

82 C.J.S., Statutes § 252.

§ 75-4-105. Definitions of types of banks.

In this chapter:

(1) [Reserved]

(2) "Depositary bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter.

(3) "Payor bank" means a bank that is the drawee of a draft.

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depositary or payor bank.

(5) "Collecting bank" means a bank handling an item for collection except the payor bank.

(6) "Presenting bank" means a bank presenting an item except a payor bank.

SOURCES: Codes, 1942, § 41A:4-105; Laws, 1966, ch. 316, § 4-105; Laws, 1992, ch. 420, § 76; Laws, 2010, ch. 506, § 28, eff from and after July 1, 2010.

Cross References — Commercial paper, see § 75-3-101 et seq.

JUDICIAL DECISIONS

1. In general.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) $_________," and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee—and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. Horney v. Covington County Bank, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Drawee bank is clearly "payor" bank under UCC § 4-105(b). Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Bank which was both first bank to which payee's checks were transferred and also bank that was liable for payment of such checks as drawn was both depositary bank and payor bank under UCC § 4-105(a) and (b). Bartlett v. Bank of Carroll, 218 Va. 240, 237 S.E.2d 115 (1977).

Bank was not "payor bank," as defined in UCC § 4-105(b), with respect to sight drafts which were drawn on buyer of meat and which were sent to bank by seller accompanied by invoices for meat, although drafts stated they were payable at bank, where there were no funds of buyer specifically deposited to seller's credit out of which seller had right to direct bank to make payment. Whitehall Packing Co. v. First Nat'l City Bank, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Bank that cashed forged checks was not "collecting bank" within meaning of UCC § 4-105(d) where person who cashed checks was not "customer" of bank, in that she had no account at bank, and where bank did not take checks for collection but rather purchased them, paying cash for them, and sought to collect on them for its own account. Board of Higher Educ. v. Bankers Trust Co., 86 Misc. 2d 560 (1976).

Bank was acting as both depository and collecting bank under UCC § 4-105 so as to have right under UCC § 4-212 to charge payees' account or obtain refund for money advanced on basis of treasury bills, where treasury bills were dishonored after payees were allowed to overdraw their account by amount to be received for bills discounted and sold through normal market channels. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. Berman v. United States Nat'l Bank, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's payees was forged. Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co., 514 S.W.2d 860 (Mo. Ct. App. 1974).

A bank was acting merely as a collecting bank and not as a payor bank where it transmitted from the stockbroker to the stockbroker's customer the draft covering the purchase price of the stock but these were returned by the bank to the customer because unable to pay for them. Phelan v. University Nat'l Bank, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

RESEARCH REFERENCES

ALR. Construction of UCC § 4-105, which defines "payor bank," "collecting bank," and the like. 84 A.L.R.3d 1073.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 963, 976-978.

15A Am. Jur. 2d, Commercial Code §§ 67, 69, 70.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:11, 4:12 (General provisions and definitions).

CJS. 9 C.J.S., Banks and Banking §§ 1, 2, 681, 684, 708.

§ 75-4-106. Payable through or payable at bank; collecting bank.

(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is "payable at" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.

SOURCES: Laws, 1992, ch. 420, § 77, eff from and after January 1, 1993.

Editor's Note — Provisions formerly found in § 75-4-106 can now be found in § 75-4-107.

§ 75-4-107. Separate office of bank.

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders must be given under this chapter and under Chapter 3.

SOURCES: Formerly § 75-4-106: Codes, 1942, § 41A:4-106; Laws, 1966, ch. 316, § 4-106; Laws, 1992, ch. 420, § 78, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-106. Provisions formerly found in § 75-4-107 can now be found in § 75-4-108.

Cross References — Notice, knowledge or notification received by organization, effectiveness generally, see § 75-1-202.

Commercial paper, see § 75-3-101 et seq.

Who is holder in due course, see § 75-3-302.

Presentment, how made, see §§ 75-3-501, 75-4-212.

Liability for action or nonaction by or at branch or separate office of bank, law governing, see § 75-4-102.

Holder in due course, when bank gives value for purpose of determining status as, see § 75-4-211.

Regulation of branch banks, generally, see § 81-7-1 et seq.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-4-106.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-106.

6. In general.

The application of UCC § 4-106 is not mandatory. The Official Comments indicate that a branch or separate office of a bank may be treated as a separate bank for certain purposes while maintaining the bank's single legal entity for other purposes. The comments also correctly note that as a practical matter, many branches function as separate banks in the handling and payment of certain items and require time for doing so. This is especially true in states where branch banking is permitted throughout the state. The Official Comments specifically suggest that where Article 4 imposes time limits, such as those for notice of dishonor, a branch that functions as a separate bank should be entitled to the time limits that are available to a separate bank. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979) (stating that under North Carolina UCC § 4-106, a bank is no longer required to maintain its own deposit ledgers before being entitled to separate bank treatment, and that the legislature's intent was to aid branch banks in attaining separate bank status).

In action by bank against customer to recover overdraft created when bank charged back amount of dishonored check to customer's account, where (1) check in suit, which was drawn by corporation on its account with plaintiff's Wilmington branch and made payable to defendant, was presented by defendant on Friday, March 18, 1977, at Wilmington branch, after its cutoff hour, for deposit in defendant's account with plaintiff's High Point branch, thereby making check legally presented on Monday, March 21, 1977, (2) check was processed at plaintiff's eastern operations center on March 21, 1977, and processing included wiring deposit to plaintiff's western operations center for provisional credit to defendant's account with High Point branch and debiting of drawer's account at eastern operations center for amount of check, (3) on March 22, 1977, plaintiff's "Transactions not Posted Report" listed check as nonposted because of insufficient funds, and it was returned on same day to plaintiff's western operations center for charge-back to defendant's account, (4) on March 23, 1977, western operations center received check, charged it back to defendant's account, and mailed it, along with notice of its dishonor, to defendant, and (5) defendant in the meantime had written check on his account, with result that charge-back created overdraft as to which defendant refused to reimburse plaintiff, court held (1) that under UCC § 4-106, dealing with treatment of branch bank as separate bank for purpose of computing time within which, and place at which, action may be taken or notices given under the code, both High Point and Wilmington branches of plaintiff bank were entitled to separate bank status, (2) that since Wilmington branch was payor bank in the transaction, before it could revoke any provisional settlement, it had to comply with UCC § 4-301(4)(b), which provides that an item is "returned" when it is sent or delivered to the bank's transferor, (3) that since defendant had presented check for deposit in his High Point account, that branch was both collecting bank and transferor of check for collection and thus entitled to its return or notice of its dishonor, (4) that payor bank (Wilmington branch) had preserved its right to revoke provisional settlement for check by returning it to collecting bank (High Point branch) before payor bank had made final payment and before its midnight deadline, as required by UCC § 4-301(1)(a), and (5) that since collecting bank (High Point branch), which had given defendant provisional settlement for check, received returned check for charge-back on March 23, 1977, and mailed both check and notice of its dishonor to defendant on same day, it acted well within its midnight deadline under UCC § 4-212(1) and, having received no final settlement on check, was entitled to charge it back against defendant's account to cover overdraft. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

The effect of UCC § 4-106 is to give a branch bank that is a payor bank its own midnight deadline for carrying out its duties as payor, even though it keeps no deposit ledgers or similar books. Idah-Best, Inc. v. First Sec. Bank, 99 Idaho 517, 584 P.2d 1242 (1978).

In action by payee of check drawn on, and dishonored by, defendant Hailey branch of First Security Bank of Idaho, in which payee alleged that defendant had failed to return check or give notice of its dishonor before defendant's midnight deadline, where (1) payee deposited check on Friday, October 31, 1975, in its account with Twin Falls bank (not a part of First Security Bank of Idaho) and received provisional credit for such deposit, (2) Twin Falls bank, acting as payee's agent for collection, mailed check on Monday, November 3, 1975, to Boise branch of First Security Bank of Idaho for deposit in its commercial check-clearing account with Boise branch and received provisional credit for such deposit, (3) check arrived at Boise branch on Tuesday, November 4, 1975, and was sent to First Security Bank's data processing center, which was located in basement of First Security's Boise branch and performed numerous functions for both the Boise and Hailey branches, (4) on night of November 4, 1975, name of bank on which check was drawn and check's account number were sent to First Security Bank's computer at Salt Lake City, Utah, which informed data processing center at Boise branch that check's account contained insufficient funds to pay check, (5) on Wednesday, November 5, 1975, Boise branch sent check to defendant Hailey branch, (6) on Thursday, November 6, 1975, Hailey branch dishonored check, stamped "refer to maker" on it, and returned it to Boise branch with a clearings letter that effected reversal of provisional credit previously given to Boise branch and provisional debit given to defendant Hailey branch, (7) on Monday, November 10, 1975, Boise branch debited Twin Falls bank's account at Boise branch for check's amount and sent check to Twin Falls bank, (8) on Wednesday, November 12, 1975, Twin Falls bank received check and sent payee notice of dishonor on following day, and (9) payee received such notice on Friday, November 14, 1975, more than two weeks after check's deposit was made, court held (1) that trial court had erred in ruling that for purposes of UCC § 4-302(a), dealing with payor bank's liability for late return of demand item, arrival of check at First Security Bank's data processing center constituted "presentment on" and "receipt by" defendant Hailey branch of such check, so as to cause Hailey branch's midnight deadline to begin to run from time of check's arrival at data processing center, (2) that although data processing center performed some routine accounting steps for both Boise and Hailey branches, this did not destroy the essential character of the transaction, namely, that Boise branch had acted as collecting and presenting bank for item that only Hailey branch could pay, (3) that under UCC § 4-106, separate status of a branch bank is to be respected in computing its midnight deadline, even though some of the branch's duties are performed outside the branch, (4) that nothing in the record showed that the data processing center had had any authority to receive presentment of check in suit or any means of ascertaining check's genuineness and sufficiency of drawer's funds to pay it, (5) that check's presentment on payor bank therefore occurred when check physically arrived at defendant Hailey branch with indorsements of all prior transferors, including that of the Boise branch, and not when it arrived at data processing center in the Boise branch, and (6) that as a result, defendant Hailey branch's midnight deadline had to be calculated from time check was physically presented to and received by it. Idah-Best, Inc. v. First Sec. Bank, 99 Idaho 517, 584 P.2d 1242 (1978).

Under Code § 4-106, notice of adverse claim received by one branch of bank did not constitute constructive notice thereof to any other branch of same bank. Gutekunst v. Continental Ins. Co., 486 F.2d 194 (2d Cir. N.Y. 1973) (applying New York law).

RESEARCH REFERENCES

ALR. Construction of UCC § 4-106 defining separate or branch office of bank. 5 A.L.R.4th 938.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 523, 623-631.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:51, 4:52 (General provisions and definitions; branch offices).

CJS. 9 C.J.S., Banks and Banking §§ 45, 46.

§ 75-4-108. Time of receipt of items.

(a) For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 P.M. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

SOURCES: Formerly § 75-4-107: Codes, 1942, § 41A:4-107; Laws, 1966, ch. 316, § 4-107; Laws, 1992, ch. 420, § 79, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-107. Provisions formerly found in § 75-4-108 can now be found in § 75-4-109.

Cross References — Definition of "banking day", see § 75-4-104.

Regulation of banking hours, generally, see § 81-5-97.

RESEARCH REFERENCES

ALR. Liability of bank in connection with night depositor service. 27 A.L.R.2d 530.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 726.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 977, 978.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:64 (Instruction to jury; cut-off hour; time of receipt of items).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:1336 et seq. (Time of receipt of items).

CJS. 9 C.J.S., Banks and Banking §§ 287, 289, 408.

§ 75-4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this code for a period not exceeding two (2) additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this code or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.

SOURCES: Formerly § 75-4-108: Codes, 1942, § 41A:4-108; Laws, 1966, ch. 316, § 4-108; Laws, 1992, ch. 420, § 80, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-108. Provisions formerly found in § 75-4-109, (Codes, 1942, § 41A:4-109; Laws, 1966, ch. 316, § 4-109), defining the process of posting, have been repealed.

Cross References — Where Code chapters 3 and 4 conflict, chapter 4 is controlling, see §§ 75-3-102, 75-4-102.

Time for presentment, see § 75-3-501.

Varying effect of Code provisions by agreement; effect of Federal Reserve regulations and operating letters, clearinghouse rules, and the like, see § 75-4-103.

"Payor bank" defined, see § 75-4-105(b).

Definition of "collecting bank," see § 75-4-105(d).

Responsibility for collection; when action seasonable, see § 75-4-202.

Right of charge-back or refund, see § 75-4-214.

When item is finally paid by payor bank, see § 75-4-215.

Recovery of payment by return of items; time of dishonor, see § 75-4-301.

Payor bank's responsibility for late return of item, see § 75-4-302.

JUDICIAL DECISIONS

1.-5. [Reserved for future use.]
6. Under former § 75-4-108: Delays.
7. Under former § 75-4-109: Process of posting.

1.-5. [Reserved for future use.]

6. Under former § 75-4-108: Delays.

Fact that payor bank did not hold check beyond its midnight deadline in order to accommodate its customer did not justify excusing bank under UCC § 4-108(2) for failure to meet midnight deadline. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Payor bank which did not dishonor and return check for insufficient funds until after bank's midnight deadline was not excused under UCC § 4-108(2) for not meeting such deadline simply because of heavy volume of checks handled during Christmas holiday, breakdown of two of bank's checkposting machines, and absence of one bookkeeper because of illness, where such circumstances were foreseeable and thus were under bank's control, but responsible bank officers had not established any procedure for timely return of bad checks during busy holiday season (observing that defendant bank could have returned check before its midnight deadline simply by depositing it in the mail). Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

7. Under former § 75-4-109: Process of posting.

UCC § 4-109(e) permits the reversing of an entry after a check is charged to the drawer's account only if there was an error in the posting. H. Schultz & Sons v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977).

UCC § 4-109(e) did not justify a bank reversing an entry where the bank had proven the check and debited the drawer's account and learned the next day that the drawer had filed for bankruptcy. H. Schultz & Sons v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977).

Where bank had made final posting of check under UCC § 4-109 and then wrongfully reversed it, bank was liable to payee. H. Schultz & Sons v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977).

UCC § 4-109(e) does not permit payor bank, without regard to its reason or purpose, to reverse an entry at any time up to the midnight deadline. Instead, subsection (e) permits corrective action to be taken only in those cases where an error of some type has been made by the bank in completing its process of posting. Thus, where bank had completed without error its process of posting check payable to plaintiff on account maintained by drawer with bank, notice received by bank on following day of drawer's bankruptcy came too late to permit reversal of bank's entry, payment was final under final-payment rule, and bank was liable to plaintiff for face amount of check. H. Schultz & Sons v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977).

The Code defines the process of posting in terms of the usual procedure followed by the payor bank. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

The process of posting embraces two elements: (1) the exercise of judgment to determine to make payment and (2) the mechanical element of recording the action taken by the bank. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

Until the expiration of the clearing house deadline, the payor bank may reverse the entry of payment. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

The right to reverse an entry is not limited to the correction of an entry erroneously made and the bank may therefore reverse an entry in order to comply with a stop payment order. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

In view of the omission of this section from the Ohio Commercial Code the court was obliged to look to non-code law to determine whether or not the process of posting a check drawn against a depositor's account had been completed prior to receipt by the bank of a restraining order prohibiting it from paying money from the account. Gibbs v. Gerberich, 1 Ohio App. 2d 93, 203 N.E.2d 851, 17 A.L.R.3d 928 (1964).

RESEARCH REFERENCES

ALR. Construction and effect of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment. 22 A.L.R.4th 10.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 963-967, 974, 980-984.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:75 (Failure of drawee to give notice of nonpayment of check; maker bankrupt).

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:61-4:63 (Time provisions).

CJS. 9 C.J.S., Banks and Banking §§ 332-334, 434, 436-438, 417.

§ 75-4-110. Electronic presentment.

(a) "Agreement for electronic presentment" means an agreement, clearinghouse rule, or Federal Reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to "item" or "check" in this chapter means the presentment notice unless the context otherwise indicates.

SOURCES: Laws, 1992, ch. 420, § 81, eff from and after January 1, 1993.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 288, 290-291.

CJS. 10 C.J.S., Bills and Notes §§ 202-209.

§ 75-4-111. Statute of limitations.

An action to enforce an obligation, duty, or right arising under this chapter must be commenced within three (3) years after the cause of action accrues.

SOURCES: Laws, 1992, ch. 420, § 82, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. When statute of limitations starts to run against depositor's cause of action against bank to recover funds paid out on check bearing forged indorsement. 82 A.L.R.2d 933.

Computer sales and leases: time when cause of action for failure of performance accrues. 90 A.L.R.4th 298.

Am Jur. 12 Am. Jur. 2d, Bills and Notes § 581 et seq.

PART 2.

COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS.

Sec.

75-4-201. Status of collecting bank as agent and provisional status of credits; applicability of chapter; item indorsed "pay any bank."

75-4-202. Responsibility for collection or return; when action timely.
75-4-203. Effect of instructions.
75-4-204. Methods of sending and presenting; sending directly to payor bank.
75-4-205. Depositary bank holder of unindorsed item.
75-4-206. Transfer between banks.
75-4-207. Transfer warranties.
75-4-208. Presentment warranties.
75-4-209. Encoding and retention warranties.
75-4-210. Security interest of collecting bank in items, accompanying documents and proceeds.
75-4-211. When bank gives value for purposes of holder in due course.
75-4-212. Presentment by notice of item not payable by, through, or at bank; liability of drawer or indorser.
75-4-213. Medium and time of settlement by bank.
75-4-214. Right of charge-back or refund; liability of collecting bank; return of item.
75-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.
75-4-216. Insolvency and preference.

§ 75-4-201. Status of collecting bank as agent and provisional status of credits; applicability of chapter; item indorsed "pay any bank."

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this chapter apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder until the item has been:

(1) Returned to the customer initiating collection; or

(2) Specially indorsed by a bank to a person who is not a bank.

SOURCES: Codes, 1942, § 41A:4-201; Laws, 1966, ch. 316, § 4-201; Laws, 1992, ch. 420, § 83, eff from and after January 1, 1993.

Cross References — Indorsement, how made, see § 75-3-204.
Special indorsement, see § 75-3-205.
What is restrictive indorsement, see § 75-3-206.
Effect of restrictive indorsement, see § 75-3-206.

Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

Transfer between banks, methods which identify transferor bank, see § 75-4-206.

When bank has security interest in item and accompanying documents, see § 75-4-210.

Finality of settlement of item by means of remittance instrument or authorization to charge, see § 75-4-213.

Charge back of items, see § 75-4-214.

When item is finally paid by payor bank, see § 75-4-215.

Risk of loss in event of insolvency, see § 75-4-216.

Payor bank's accountability with respect to item presented on or received by it, see § 75-4-302.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2. Collecting bank as agent.
3. Liability.
4. Collecting bank as holder.
5. —As holder in due course for value.

II. Pre-Uniform Commercial Code Decisions.

6. In general.

I. Under Current Law.

1. In general.

A bank in which checks, given in payment of a life insurance claim, were deposited, thereby became the debtor of the designated principal and not of the depositor, who acted in her behalf, and consequently the designated principal received payment of her claim, as far as the life insurance company was concerned, stating that the same result would be reached under the Uniform Commercial Code, and referring to this section. Savidge v. Metropolitan Life Ins. Co., 380 Pa. 205, 110 A.2d 730 (1955).

2. Collecting bank as agent.

Where (1) general contractor, on being informed of subcontractor's failure to pay supplier for two transformers, gave check for cost of transformers to subcontractor's employee, (2) at bottom of check, which was made payable to order of defendant bank for subcontractor's account, was drawer's notation that it was issued for transformers in suit, (3) subcontractor's employee, on delivering check to bank, instructed bank to apply proceeds to certain sight drafts drawn on subcontractor, none of which covered transformers in suit, and (4) bank complied with employee's instructions drawer of check (general contractor) could not successfully contend that under UCC 4-201(1), dealing with agency status of collecting banks, bank was supplier's agent and should have applied check's proceeds to pay supplier for transformers, since under UCC § 4-201, a collecting bank is not a general agent, its agency status being limited to collection of items. United States ex rel. Westinghouse Elec. Corp. v. Sommer Corp., 580 F.2d 179 (5th Cir. C.Z. 1978) (holding, in Miller Act suit, that bank was justified in following instructions of subcontractor's employee on application of check's proceeds).

In a corporation's suit against a bank for recovery of amount of check which the bank received for account of the corporation which had previously closed out its account, the court held that the bank had failed to meet its statutory obligation to use ordinary care when, contrary to the unqualified written instructions of the plaintiff, it (1) seized and deposited the checks under closed account of plaintiff and (2) having deposited the checks, failed to remit all balances to the plaintiff's account in North Carolina, as instructed. The court also said that the argument could be made that under § 4-201 of the UCC, at the closing of the account, the bank no longer remained an agent of the plaintiff and for that reason alone had no authority to accept, deposit or disburse checks payable to the plaintiff. General Apparel Sales Corp. v. Chase Manhattan Bank, 321 F. Supp. 891 (S.D.N.Y. 1970).

Presumption that collecting bank acts as agent for depositor under Code § 4-201(1) presupposes that bank acts in accordance with its duty imposed by law; this requires presentation to payor bank in due course of business and, if check is dishonored, notice to its depositor "by its midnight deadline or within a longer reasonable time" under circumstances as stated in Code § 4-212(1); if there is substantial failure of bank to perform this duty, bank loses right of charge-back granted in Code § 4-212. First Sec. Bank v. Ezra C. Lundahl, Inc., 22 Utah 2d 433, 454 P.2d 886 (1969).

Key words "payable through Manufacturer's National Bank" on face of instrument grant bank status of "collecting bank" rather than that of "payor bank" under Code § 3-120; any settlement made by collecting bank until settlement is actually finalized, is only provisional in nature with bank becoming agent or subagent of owner of instrument under Code § 4-201. Manufacturers Nat'l Bank v. Sutherland, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

Prior to final settlement a collecting bank is merely the agent for collection of a check deposited by the owner and any settlement is provisional. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

3. Liability.

Where payee endorsed and deposited check in his account with bank, bank credited payee's account and forwarded check to foreign payor bank for payment, and payee withdrew full amount of deposit before dishonor of check by payor bank, payee remained owner of check and bank was agent for collection, so that credit given for deposit was only provisional settlement and risk of loss on check remained in payee as owner, and not upon agent bank; and bank's failure to make formal protest was immaterial since payee's liability was based not on his endorsement of check but on his status as depositor and withdrawer of funds. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

4. Collecting bank as holder.

Company whose checks were cashed by bank upon forged indorsement could not base its right to recover from bank on guarantee contained in indorsement reading, "Pay to Any Bank, Banker or Trust Company. All Prior Indorsements Guaranteed"; in effect, that indorsement coupled with delivery of checks to company destroyed their negotiability. Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973) (applying Georgia law).

A bank which accepts a check for collection and, for that purpose, acts as its depositor's agent is also a holder of the check, and the fact that it does not own the item is immaterial insofar as its status as a holder is concerned. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

5. —As holder in due course for value.

Creation of agency relationship under UCC § 4-201 was not intended to impair depository bank's rights as holder in due course; held, while collecting bank is presumed to be agent of owner, it may at same time be holder in due course of deposited item. Long Island Nat'l Bank v. Zawada, 34 A.D.2d 1016 (2d Dep't 1970) (citing annotation).

The fact that the bank is merely a collecting agent does not prevent it from being the holder in due course of the item it is collecting when it has satisfied all the requirements thereof. Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968).

Where the full amount of credit given to the drawer of seven drafts was withdrawn, the bank which held them possessed a security interest to that extent in the instruments and a concommitant status as a holder in due course. F & M Nat'l Bank v. Boardwalk Nat'l Bank, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

A bank holding a check returned to it marked "unpaid" because of maker's death which, prior to maker's death, had given the payee immediate credit therefor becomes a holder for value of decedent's check prior to his death. Sandler v. United

Indus. Bank, 23 A.D.2d 567 (2d Dep't 1965).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

This section of the Uniform Commercial Code will alter the result of a case holding that where a bank customer deposited a check in his account, indorsing it "for deposit only to the credit of" the depositor, and subsequently the bank allowed him to draw against the uncollected check, the bank was not holder in due course. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

A bank which receives checks for collection only and indorsed without restriction and which, although not required to do so, allows its customer to draw to the full amount of the checks before they have been collected becomes a holder for value of the checks. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

II. Pre-Uniform Commercial Code Decisions.

6. In general.

Collecting bank held agent of depositor of claim. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 4, dealing with bank deposits and collections. 18 A.L.R.3d 1376.

Construction and application of UCC § 4-205(1) allowing depositary bank to supply customer's indorsement on item for collection. 29 A.L.R.4th 631.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 713.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 880, 882, 927, 962, 963, 978.

12 Am. Jur. 2d, Bills and Notes § 581.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:77, 4:78 (Status and duties of collecting banks).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2281 et seq. (Agency status of collecting banks).

CJS. 9 C.J.S., Banks and Banking § 407 et seq.

§ 75-4-202. Responsibility for collection or return; when action timely.

(a) A collecting bank must exercise ordinary care in:

(1) Presenting an item or sending it for presentment;

(2) Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;

(3) Settling for an item when the bank receives final settlement; and

(4) Notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to subsection (a)(1), a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit.

SOURCES: Codes, 1942, § 41A:4-202; Laws, 1966, ch. 316, § 4-202; Laws, 1992, ch. 420, § 84, eff from and after January 1, 1993.

Cross References — Standard requirement of good faith, see § 75-1-304.

Presentment, notice of dishonor and protest, generally, see § 75-3-501 et seq.

Time for presentment, see § 75-3-501.

Manner of presentment, see § 75-3-501.

Fixing cutoff hour for handling of items, see § 75-4-108.

Delays as result of good faith effort by collecting bank to secure payment, or due to circumstances beyond its control, see § 75-4-109.

Forwarding of item to be presented, see § 75-4-204.

Presentment by means of written notice, see § 75-4-212.

Provisional settlement, charge back and return of item, see § 75-4-214.

Deferred posting, see § 75-4-301.

Payor bank's accountability for item presented on and received by it, see § 75-4-302.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2. Particular duties.

II. Pre-Uniform Commercial Code Decisions.

3. In general.

I. Under Current Law.

1. In general.

Warranties of §§ 75-3-414, 75-4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Under UCC § 4-202(1), a collecting agent's duties and authority are (1) to present the item or send it for presentment, (2) to notify its transferor of nonpayment or dishonor, and (3) to settle for the item when it receives final settlement. United States ex rel. Westinghouse Elec. Corp. v. Sommer Corp., 580 F.2d 179 (5th Cir. C.Z. 1978).

2. Particular duties.

Collecting bank, which held for 52 days after presentment for payment three sight drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503(2); and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. Southern Cotton Oil Co. v. Merchants Nat'l Bank, 670 F.2d 548 (5th Cir. 1982).

In an action by a vendor against a collecting bank which was unable to obtain foreign exchange in United States dollars for the full amount of the proceeds of three shipments of electrical equipment which had been shipped to Santo Domingo and had been fully paid for by the vendee in Dominican pesos, summary judgment was properly granted to the defendant, since the liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located (Uniform Commercial Code, § 4-102, subd [2]), and defendant's ability to remit the funds had been restricted by Dominican law; moreover, defendant, as a collecting bank, neither breached its agreement with plaintiff nor failed to exercise ordinary care (Uniform Commercial Code, § 4-202) by collecting the sight drafts in Dominican pesos, since prior conduct of the parties indicated that the instructions on the sight drafts which stated that collections were to be made in United States dollars were to be construed to mean only that the ultimate remittance was to be in dollars. Douglaston Elec. Sales, Inc. v. Royal Bank of Canada, 69 A.D.2d 565 (2d Dep't 1979).

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

In suit by cattle sellers against bank under UCC § 4-202(1) and (2) for bank's negligently holding, on corporate-cattle buyer's instructions, unpaid drafts given sellers in payment for their cattle beyond bank's midnight deadline, where evidence showed (1) that drafts were received by bank between September 20 and September 28, 1973, but were not returned to sellers' banks until October 3, 1973, when corporate buyer collapsed following failure of efforts to rescue it from insolvency, (2) that bank itself was declared insolvent on October 4, 1973 because of unsecured credit extensions to buyer, (3) that sellers were unsecured creditors of buyer, (4) that cattle had been sold to buyer in ordinary course of business before drafts arrived at bank, (5) that even with timely notice of nonpayment of drafts, sellers could not have recovered by stopping delivery of cattle or replevying them, and (6) that sellers as matter of law could not have recovered amount of drafts through liens on buyer's assets, since such assets were already subject to valid prior liens, district court properly held that there was sufficient evidence to show that bank had failed to use ordinary care in handling drafts. However, district court erred in denying bank's motion for judgment n. o. v. and in accepting sellers' contention that other evidence in case supported possibility that drafts were collectible, since that possibility was exceedingly remote and under UCC § 4-103(5), governing damages for failure to exercise ordinary care in handling items, sellers to be entitled to recover damages from bank were required to show existence of reasonable chance of collecting on drafts. Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

In action against collecting bank by cattle dealers who had drawn sight drafts on cattle buyer through collecting bank for purchase price of cattle delivered to buyer, alleging that collecting bank was negligent in failing to return unpaid drafts within requisite midnight deadline, collecting bank failed to carry burden of proving that it had taken seasonable action under UCC § 4-202(2), with respect to sight drafts returned after its midnight deadline, by demonstrating course of dealings between buyer and cattle sellers acquiesced in by collecting bank or by "custom and usage" as it related to collecting banks and utilization of sight drafts in cattle industry, where cattle dealers' prior dealings with buyer, if any, amounted to isolated incidences rather than course of dealings which established certain expectations or common basis of understanding between the parties, where there was uncontroverted testimony by other bankers to effect that it was not custom of their bank or banks with which they were familiar, when acting as collecting banks, to hold comparable sight drafts beyond midnight deadline, and where cattle dealers did not acquiesce in collecting bank's handling of drafts, having taken immediate action to reclaim cattle when made fully aware of buyer's concealed inability to pay draft. Marcoux v. Mid-States Livestock, Inc., 429 F. Supp. 155 (N.D. Iowa 1977), aff'd, 572 F.2d 651 (8th Cir. Iowa 1978), cert. dismissed, 439 U.S. 801, 99 S. Ct. 43, 58 L. Ed. 2d 94 (1978) (applying Iowa law).

In action by seller to recover for negligent handling of sight drafts sent to bank accompanied by invoices for meat shipped to buyer where, inter alia, portion of drafts which directed payor to charge certain account was left blank: (1) bank was "collecting bank" obligated under UCC § 4-202 to exercise ordinary care in presenting drafts for payment to buyer rather than "payor bank;" (2) there were questions of fact, precluding summary judgment, as to whether bank's delay in holding drafts for more than 30 days, after buyer told bank to hold drafts without making payment, before returning them to seller unpaid was reasonable in light of financial condition of buyer and whether seller could have realized face value of drafts if notified of dishonor sooner than it was. Whitehall Packing Co. v. First Nat'l City Bank, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Collecting bank's failure to return sight drafts immediately after its customer, the drawee of the drafts, instructed bank to hold them, instead of authorizing payment, did not constitute failure to return drafts seasonably or to use ordinary care in handling them where drawer of drafts was interested in payment and for bank to have returned each draft by midnight deadline would not have achieved that result; where bank knew that, under similar circumstances drawee did not at once authorize payment of other shipper's drafts, but did so after some delay, in one instance as long as 25 days; and where evidence showed that drawee could not pay for merchandise until it was sold and that in fact it used proceeds of sales to pay drawer outstanding balance on open account. Wilhelm Foods, Inc. v. National Bank of N. Am., 388 F. Supp. 1376 (S.D.N.Y. 1974) (applying New York Law).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under

UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depositary, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. Isaacs v. Chartered New England Corp., 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Collecting agent clearly has right to demand repayment from defendants on dishonor of instrument, provided plaintiff had performed all of necessary duties of collecting bank under Code § 4-202. Manufacturers Nat'l Bank v. Sutherland, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

Duty of ordinary care imposed on collecting bank does not create duty of ascertaining whether given check was issued by mistake; California Code comment states quite clearly that this section changes prior California law only in that it changes basis of recovery against collecting banks from negligence theory to warranty theory, and that Code does not change rules or principles by which such recovery is established. Frontier Ref. Co. v. Home Bank, 272 Cal. App. 2d 630 (2d Dist. 1969).

Where broker's representative with knowledge of nonpayment of drafts instructed collecting banks to hold and not return drafts, any delay in handling drafts was result of obeying broker's instructions and bank had not failed to carry out its responsibilities to customer. Phelan v. University Nat'l Bank, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

Where a check had been accepted by the drawee bank for collection the bank becomes the collecting agent of the holder and is required to use ordinary or reasonable diligence and care in making the collection. Georgia Bank & Trust Co. v. Hadarits, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

Where the defendant, a collecting bank, had properly presented plaintiff's sight draft to the drawee and the draft was uncollectible because of the Cuban nationalization of banks in which the drawee's funds were deposited, and subsequently funds of the drawee came into possession of the defendant in the course of normal commercial transactions unrelated to the agency relationship, the defendant could properly apply the money to debts owed to it, and there was no purpose in requiring the defendant to notify the plaintiff of the existence of the fund and no liability would flow from the failure to do so. Hydrocarbon Processing Corp. v. Chemical Bank N.Y. Trust Co., 16 N.Y.2d 147, 209 N.E.2d 806 (1965).

A bank which exercises ordinary care in its unsuccessful efforts to collect a draft for its principal is not thereafter precluded from applying on a debt due to its funds of the common debtor, which in good faith came into its possession through a transaction unrelated to the agency relationship. Hydrocarbon Processing Corp. v. Chemical Bank N.Y. Trust Co., 16 N.Y.2d 147, 209 N.E.2d 806 (1965).

II. Pre-Uniform Commercial Code Decisions.

3. In general.

Collecting bank cannot extend time of payment. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank held guilty of negligence and liable to payee for amount of check. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 969, 980-982.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:71 et seq. (Status and duties of collecting banks).

17 Am. Jur. Proof of Facts 3d 541, Banking Negligence — Improper dishonor of Letter of Credit.

CJS. 9 C.J.S., Banks and Banking §§ 332-334, 434, 436-438, 417.

§ 75-4-203. Effect of instructions.

Subject to Chapter 3 concerning conversion of instruments (Section 75-3-420) and restrictive indorsements (Section 75-3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor.

SOURCES: Codes, 1942, § 41A:4-203; Laws, 1966, ch. 316, § 4-203; Laws, 1992, ch. 420, § 85, eff from and after January 1, 1993.

Cross References — Effect of restrictive indorsement, see § 75-3-206.

Conversion of instruments, see § 75-3-420.

Restrictive indorsement, discharge of liability of any party (other than intermediary bank or payor bank which is not depositary bank) who pays or satisfies holder of instrument so indorsed, see § 75-3-603.

Agreement which cannot disclaim collecting bank's responsibility for own lack of good faith or failure to exercise ordinary care, see § 75-4-103.

Intermediary bank, or payor bank which is not also depositary bank, permitted to ignore restrictive indorsement of any person except bank's immediate transferor, see § 75-4-205.

JUDICIAL DECISIONS

1. In general.

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and since during interim depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account, under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

RESEARCH REFERENCES

ALR. Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions § 967.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:76 (Answer; defense; collecting bank followed instructions of transferor).

CJS. 9 C.J.S., Banks and Banking §§ 333, 434, 436-438, 417.

§ 75-4-204. Methods of sending and presenting; sending directly to payor bank.

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

(1) An item directly to the payor bank;

(2) An item to a nonbank payor if authorized by its transferor; and

(3) An item other than documentary drafts to a nonbank payor, if authorized by Federal Reserve regulation or operating circular, clearinghouse rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

SOURCES: Codes, 1942, § 41A:4-204; Laws, 1966, ch. 316, § 4-204; Laws, 1992, ch. 420, § 86, eff from and after January 1, 1993.

Cross References — Presentment, how made, see § 75-3-501.

Collection of documentary drafts, see §§ 75-4-501 to 75-4-504.

JUDICIAL DECISIONS

1. In general.

Warranties of §§ 75-3-414, 75-4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). Rapp v. Dime Sav. Bank, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

A collecting bank is expressly authorized by UCC § 4-204(2) to send an item directly to a payor bank instead of placing item for collection through regular clearing house channels, and collecting bank is not thereby relieved of its duty to notify payor bank that check would not be paid. Central Bank & Trust Co. v. First Northwest Bank, 332 F. Supp. 1166 (E.D. Mo. 1971), aff'd, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom in banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 962, 967, 971, 972.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:80 (Procedure for sending check or other item for collection).

CJS. 9 C.J.S., Banks and Banking §§ 333, 434, 436-438, 417.

§ 75-4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of Section 75-3-302, it is a holder in due course; and

(2) The depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account.

SOURCES: Codes, 1942, § 41A:4-205; Laws, 1966, ch. 316, § 4-205; Laws, 1992, ch. 420, § 87, eff from and after January 1, 1993.

Cross References — Effect of restrictive indorsement, see § 75-3-206.

Conversion of instrument, see § 75-3-420.

Discharge of liability of any party to extent of payment or satisfaction to holder; effect as to liability of party who pays in manner not consistent with terms of restrictive indorsement, see § 75-3-603.

Effect of instructions given to collecting bank, see § 75-4-203.

JUDICIAL DECISIONS

1. In general.

In a case involving deposits made by a customer into a trust and operating account during the commission of a fraud, a bank did not lose its holder in due course status, despite the varying endorsements made by the customer, pursuant to Miss. Code Ann. §§ 75-4-205(1), 75-3-302(a); the endorsements were not defective based on a failure to reference the customer's status as a trustee. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. Bank Leumi Trust Co. v. Marine Midland Bank, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

UCC § 4-205, which provides that bank is "holder" of item delivered to it for collection or for credit to deposit account of transferor, was inapplicable to, and did not make bank a holder of, unindorsed notes, where it received notes as collateral for loan. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555 (2d Dist. 1976).

Under UCC § 4-205(1), bank was fully within its rights in cashing cashier's check upon receiving it from forwarding bank, notwithstanding check was not endorsed, where forwarding bank had stamped check "credited to account of within named payee, absence of endorsement guaranteed." Main Bank v. Davy Crockett Inn of New Braunfels, Inc., 531 S.W.2d 388 (Tex. Civ. App. 1975).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of setoff against payee. United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596 (D. Md. 1973) (applying Maryland law).

That the payee's endorsement may have been supplied by the collecting bank as the depositary bank which had taken the item for collection does not affect the collecting bank's status as a holder in due course. Central Bank & Trust Co. v. First Northwest Bank, 332 F. Supp. 1166 (E.D. Mo. 1971), aff'd, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

Where a bank places on the item deposited by its customer a statement indicating that it has been credited to its customer's account, such statement has the effect of an indorsement by the customer but does not make the bank subject in any way to any dispute between the drawer of the check and the payee. Cole v. First Nat'l Bank, 433 P.2d 837 (Wyo. 1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, or evidence as to custom in banks in locality in handling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Construction and application of UCC § 4-205(1) allowing depositary bank to supply customer's indorsement on item for collection. 29 A.L.R.4th 631.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 713.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 880, 967, 969.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:91, 4:92 (Missing indorsement; restrictive indorsement.

CJS. 10 C.J.S., Bills and Notes § 161.

§ 75-4-206. Transfer between banks.

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.

SOURCES: Codes, 1942, § 41A:4-206; Laws, 1966, ch. 316, § 4-206; Laws, 1992, ch. 420, § 88, eff from and after January 1, 1993.

Cross References — Negotiation, see § 75-3-201.

What constitutes negotiation, generally, see § 75-3-201.

Effect of transfer generally, see § 75-3-203.

JUDICIAL DECISIONS

1. In general.

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were endorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. West Penn Admin., Inc. v. Union Nat'l Bank, 233 Pa. Super. 311, 335 A.2d 725 (1975).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 713.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 880, 962, 967, 969, 971.

CJS. 9 C.J.S., Banks and Banking §§ 475-480, 517.

§ 75-4-207. Transfer warranties.

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

(1) The warrantor is a person entitled to enforce the item;

(2) All signatures on the item are authentic and authorized;

(3) The item has not been altered;

(4) The item is not subject to a defense or claim in recoupment (Section 75-3-305(a)) of any party that can be asserted against the warrantor;

(5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

(6) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in Sections 75-3-115 and 75-3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: 4-207; Laws, 1966, ch. 316, § 4-207; Laws, 1992, ch. 420, § 89; Laws, 2010, ch. 506, § 29, eff from and after July 1, 2010.

Editor's Note — Provisions contained in former § 75-4-207 can now be found in §§ 75-4-207, 75-4-208, and 75-4-209.

Cross References — Effect of transfer of commercial paper, generally, see § 75-3-201.

Obligation of indorser, see § 75-3-415.

Warranties on presentation of commercial paper, see § 75-3-417.

Finality of payment or acceptance of commercial paper, see § 75-3-418.

Presentment, how made, see § 75-3-501.

Transfers from one bank to another, see § 75-4-206.

Security interest of collecting bank, see § 75-4-210.

Collecting bank as holder in due course, see § 75-4-211.

Customer's duty to examine bank statements and items to discover unauthorized signature or alteration and to notify bank, see § 75-4-406.

JUDICIAL DECISIONS

1. In general; purpose.
2. Warranty to drawer.
3. Obligation of inquiry.
4. Warranty of title.
5. Genuine or authorized signature.
6. Absence of indorsement; words of guaranty.
7. Measure of damages.
8. Reasonable notice of claim.
9. Practice and procedure.

1. In general; purpose.

Warranties of §§ 75-3-414, 75-4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. State v. Jackson, 383 So. 2d 781 (La. 1980), cert. denied, 449 U.S. 1010, 101 S. Ct. 565, 66 L. Ed. 2d 468 (1980).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC § 4-207(1)(a) is intended to give the legal effect presently obtained by the words "prior endorsements guaranteed" in collection transfers and presentments between banks. The warranties and engagements arise automatically as a part of the bank collection process. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. National Bank v. Refrigerated Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

UCC § 4-207 is intended to give the effect formerly obtained in bank collections by the words "prior endorsements guaranteed (PEG)" in collection transfers and presentments between banks. The warranties and engagements under UCC § 4-207 arise automatically as a part of the bank collection process. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977) (applying Oklahoma law; holding that collecting bank, by receiving cashier's check over forged indorsements, failed to acquire good title to check, and that same result would have obtained in absence of bank's indorsing such check "P.E.G.").

Rationale for imposing warranties on presentment is to speed of collection of transfers and checks and to take burden off each bank to meticulously check indorsements of each item transferred; held, this rationale suggests that burden be put directly upon first bank in collection chain to make sure that indorsements are valid, and subsequent banks are not negligent if they do not thoroughly inspect each item. Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 303 F. Supp. 401 (M.D. Fla. 1969), aff'd, 431 F.2d 341 (5th Cir. Fla. 1970).

2. Warranty to drawer.

On plaintiff payor bank's motion for summary judgment in action to recover from indorser amount paid out on check on which drawer's signature had been forged, court held (1) that under UCC § 3-418, plaintiff was bound by its payment if no warranties were applicable and defendant indorser was either holder in due course or one who had in good faith changed his position in reliance on such payment; (2) that since record in case contained no allegations as to defendant's knowledge of forgery of drawer's signature, court could not determine whether defendant had breached its warranty under UCC § 4-207(1)(b) to plaintiff; (3) that record also contained insufficient information as to whether defendant was holder in due course or one who had in good faith changed his position in reliance on plaintiff's payment; and (4) that plaintiff's contention that it was subrogated under UCC § 4-407(c) to rights of drawer of check in suit against holder thereof, because plaintiff had paid check under circumstances giving drawer right to object to such payment, lack merit since customer's limited warranty under UCC § 4-207(1)(b) that he had no knowledge that drawer's signature was unauthorized is not even given to drawer with respect to drawer's own signature by customer who is holder in due course and has acted in good faith (see UCC § 4-207(1)(b)(ii)). Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978) (holding that summary judgment could not be granted to either plaintiff or defendant).

Warranties imposed on a collecting bank under UCC §§ 4-207(1) and (2) run to payor bank or other payor and to that bank's transferee and to any subsequent collecting bank, but not to drawer. Life Ins. Co. v. Snyder, 141 N.J. Super. 539, 358 A.2d 859 (1976).

Drawer of check which has been charged to its account under forged indorsement can directly sue depository and collecting banks which have warranted validity of indorsement, on implied contract theory under which drawer becomes third party beneficiary of warranties and guaranties given by these banks to subsequent persons in chain of negotiation back to drawee bank. Allied Concord Fin. Corp. v. Bank of Am., 275 Cal. App. 2d 1 (2d Dist. 1969).

3. Obligation of inquiry.

Code places burden directly upon first bank in collection chain to make sure than indorsements on check are valid; and there is no duty either under law merchant or under UCC for drawee bank to verify indorsement of payee on check which comes to it from collecting bank under warranty of indorsement. Birmingham Trust Nat'l Bank v. Central Bank & Trust Co., 49 Ala. App. 630, 275 So. 2d 148 (Civ. App. 1973), cert. denied, 290 Ala. 362, 275 So. 2d 153 (1973).

4. Warranty of title.

Endorser of forged check warrants that all signatures and certification on check are genuine and authorized and becomes obligated, upon dishonor, to pay instrument according to its tenor. White v. Hancock Bank, 477 So. 2d 265 (Miss. 1985).

The warranty of good title under UCC § 4-207(1)(a) even applies to a cashier's check. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Although the Uniform Commercial Code does not define "good title," a good-title warranty under UCC § 4-207(1)(a) is a warranty of the genuineness of indorsements. The purpose of the warranty is to place on a bank that takes an instrument from a person making an unauthorized indorsement the responsibility for collecting from that person. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

A successful action for a breach of the warranty of good title under UCC § 4-207(1)(a) does not depend on whether the named payee actually had an interest in the check that could have been asserted. Instead, a breach of the warranty occurs when a collecting bank presents a check containing a forged or unauthorized indorsement to a drawee bank and receives payment on such check. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

The implied warranty of good title created by UCC § 4-207(1)(a) does not run in favor of a payee. Instead, it runs from a customer or collecting bank which obtains payment or acceptance of an item or transfers an item for value to each subsequent payor bank or other payor which, in good faith, pays or accepts the item. Continental Cas. Co. v. Huron Valley Nat'l Bank, 85 Mich. App. 319, 271 N.W.2d 218 (1978).

Under UCC § 4-207, collecting bank, by guaranteeing prior indorsements on checks made out to fictitious payees, warranted to payor bank (which sought to recover from collecting bank) that it had good title to checks, despite lack of indorsement by named payees; collecting bank could not successfully assert as defense that it, pursuant to UCC § 4-205, had supplied missing indorsements necessary to title by indicating on checks that they were credit to customer's accounts, since named payees were fictitious and not customers of collecting bank within meaning of UCC § 4-104. Bank Leumi Trust Co. v. Marine Midland Bank, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

Where (1) plaintiff lending bank issued cashier's check for $3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through codefendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977) (applying Oklahoma law).

Partner who deposited check bearing forged indorsement into partnership account was liable for amount of check under warranty of title contained in UCC § 4-207(2) where partnership was customer of bank within meaning of UCC § 4-104, check was credited to partnership, and partner was liable under state law for partnership debts. Kelton Motors, Inc. v. Phoenix of Hartford Ins. Cos., 522 F.2d 728 (2d Cir. Vt. 1975) (applying Vermont law).

In action by insurance claimant against insurance carrier on uninsured motorist's coverage where insurer issued draft payable to claimant and her attorney, attorney without authority endorsed name of his client to draft, received payment therefore and absconded without accounting to client, and where claimant was permitted to recover from insurance company, insurance company was entitled to indemnity against collecting bank; collecting bank was liable to insurer as drawee of draft under its warranty of good title under UCC § 4-207(1)(a) and it was not entitled to assert defense of having acted in good faith and in accordance with reasonable commercial standards under UCC § 3-419(3). First Nat'l Bank v. Progressive Cas. Ins. Co., 517 S.W.2d 226 (Ky. 1974).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's payees was forged. Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co., 514 S.W.2d 860 (Mo. Ct. App. 1974).

Payor bank is in effect strictly liable to true owner if it pays instrument on forged endorsement, and collecting banks that handled instrument for collection are, in turn, strictly liable to payor bank for breach of warranty of good title. Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Collecting bank which forwarded for collection check on which there was forged indorsement breached its warranty that it had good title to check or that it was authorized to obtain payment on behalf of one who had good title and, therefore, was cast in damages to payor bank. Myers v. First Nat'l Bank, 42 A.D.2d 657 (3d Dep't 1973).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments; a collecting bank which obtains payment on cashier's checks bearing forged indorsements is liable to the payor bank on its warranty that it has good title to the instruments. Society Nat'l Bank v. Capital Nat'l Bank, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

5. Genuine or authorized signature.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

When a check is negotiated on the basis of a forged indorsement, the drawee bank may not charge the drawer's account. However, it does have the right to recover payment of the check from a prior collecting bank. A collecting bank that presents and receives payment for a check with a forged indorsement is liable for a breach of the warranty of good title created by UCC § 4-207(1)(a). Conversely, a collecting bank has a right of recovery from prior parties for a breach of the warranties of good title and genuineness of signatures. The recrediting of the drawer's account, the recovery by the drawee bank from the collecting bank, and the judgment in favor of the collecting bank against the forger is the progression contemplated by the Uniform Commercial Code. Rights of recovery continue until the party who took the check from the forger is reached. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Collecting bank's warranty when presenting check that falsely purported to have been signed by drawer's agent was limited under UCC § 4-207(1)(b)(iii) to representation that it had no knowledge that drawer's signature was unauthorized. Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y., 59 A.D.2d 645 (4th Dep't 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where customer with checking accounts at both plaintiff and defendant banks began kiting checks between such accounts and defendant, on discovering such practice, thereafter refused to honor checks drawn by customer on account with defendant, which were deposited in customer's account with plaintiff and then presented by plaintiff to defendant for payment; and where defendant continued to accept deposits by customer in account with defendant of checks drawn on customer's account with plaintiff, which checks were paid by plaintiff, in conversion action in which plaintiff sought return of funds thus accumulated in customer's account with defendant and alleged that defendant intended to apply such funds to extinguish customer's debts to defendant that would become due in future, (1) in absence of fiduciary relationship or other legal duty, defendant was not obligated to inform plaintiff that customer was kiting checks; (2) defendant had right to continue to accept for deposit checks drawn by customer on account with plaintiff, to present such checks to plaintiff for payment, and to refuse to honor checks drawn by customer on account with defendant that were deposited in account with plaintiff; (3) plaintiff was required to pay checks drawn by customer on account with it or to return such checks by midnight deadline provided by UCC § 4-104(1)(h); (4) when plaintiff paid such checks, it no longer owned funds represented thereby, and defendant thus did not convert any funds belonging to plaintiff; (5) only the customer, and not plaintiff, could complain about defendant's refusal to honor checks drawn by customer on account with defendant or defendant's applying funds accumulated in customer's account to extinguish customer's debts to defendant; and (6) defendant breached no warranty owed to plaintiff under UCC § 4-207 because all that defendant warranted, as holder of checks presented to plaintiff for payment, was that defendant had good title to such checks and that it had no knowledge that drawer's signature was unauthorized. Citizens Nat'l Bank v. First Nat'l Bank, 347 So. 2d 964 (Miss. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

Collecting bank which guaranteed indorsement of checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer's account. First Bank & Trust Co. v. County Nat'l Bank, 281 So. 2d 515 (Fla. App. 1973).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check for the loan amount made payable to the borrower and his father-in-law, which check was subsequently cashed at Bank 2 upon the borrower's endorsement and an unauthorized endorsement purportedly the signature of the father-in-law, and such check was eventually presented to Bank 1 and paid by it, Bank 2 was liable to Bank 1 under UCC §§ 3-404(1) and 4-207(2)(b). Franklin Nat'l Bank v. Chase Manhattan Bank, 68 Misc. 2d 880 (1972).

Where collecting bank obtained possession of check by unauthorized endorsement and transferred check to drawee bank by collecting bank's endorsement, receiving the amount thereof, collecting bank under UCC § 4-207 warranted to drawee bank which took item in good faith that all signatures were genuine or authorized, and collecting bank was liable to drawee bank for breach of that warranty. Mississippi Bank & Trust Co. v. County Supplies & Diesel Serv., Inc., 253 So. 2d 828 (Miss. 1971).

A payor-drawee bank cannot recover from the collecting bank for the breach of a warranty that the signature of the payee on the indorsement was genuine when the signature, otherwise a forgery, comes within the impostor provision of UCC § 3-405(1)(b) by which the indorsement forged by the payee is effective as a negotiation, because the payor-drawee bank can show no loss caused by the forgery. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

A trust company which paid money to its customer upon checks bearing forged indorsements had a valid claim against its customer to recover the money paid because it was paid under a mistake of fact, stating that this section and § 3-417 of the Uniform Commercial Code will deal with this subject matter. Krinsky v. Pilgrim Trust Co., 337 Mass. 401, 149 N.E.2d 665 (1958).

6. Absence of indorsement; words of guaranty.

California UCC § 4-207(3) applies to missing endorsements, even when words "prior endorsement guaranteed" are not used by collecting bank, and negligence of drawee bank is not bar to recovery on statutory guarantees. Feldman Constr. Co. v. Union Bank, 28 Cal. App. 3d 731 (2d Dist. 1972).

7. Measure of damages.

The word "expenses" in the last sentence of UCC § 4-207(3) includes ordinary collection expenses and, in appropriate cases, attorneys' fees. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Collecting bank which guaranteed indorsement of fictitious payee was not liable under § 4-207 for breach of warranty to drawee bank which paid check and thus sustained no insured loss in refunding payment. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Drawee bank which paid a forged instrument was not entitled to retain amount, paid to it by collecting bank which mistakenly believed it had a legal obligation to reimburse drawee, and which further mistakenly believed that collecting bank's depositor would not object to being charged with funds represented by a forged check. Valley Bank v. Bank of Commerce, 74 Misc. 2d 195 (1973), aff'd in part and rev'd in part, 13 U.C.C. Rep. Serv. (Callaghan) 515 (N.Y. App. Term 1973).

8. Reasonable notice of claim.

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

Depositary bank that collected check bearing forged endorsement was liable to collecting bank on its warranty of good title and guarantee of prior endorsements under UCC § 4-207(1), and collecting bank was similarly liable to drawee bank, notwithstanding drawer delayed 6 months in notifying drawee of suspected forgery; assuming drawer's delay in notifying drawee of suspected forgery was unreasonable under UCC § 4-406, depositary bank was not discharged from liability for breach of warranty of good title under UCC § 4-207(4) absent evidence that any party sustained loss caused by delay. Michigan Nat'l Bank v. American Nat'l Bank & Trust Co., 34 Ill. App. 3d 30, 339 N.E.2d 375 (1st Dist. 1975).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3), since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and, during interim, depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account, under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Bank that gave purchasers of cashier's checks timely notice of dishonor of endorsed draft used by purchasers in payment for cashier's checks thereby preserved its right to charge purchasers on their contract of indorsement and coextensive warranties of transfer, so as to permit offset of any liability by bank to purchasers for wrongful stoppage of payment on cashier's checks. Munson v. American Nat'l Bank & Trust Co., 484 F.2d 620 (7th Cir. Ill. 1973) (applying Illinois law).

In action on note by payee whose endorsement was forged by second payee, 3-year delay after knowledge of forgery in notifying endorsers of claim against them was not reasonable time under UCC § 4-207(4). Dobbins v. National Union Ins. Co., 70 Misc. 2d 1087 (1972).

9. Practice and procedure.

Plaintiff payor bank, which made payment of a check with a forged drawer's signature, and which is therefore bound by its payment if no warranties are applicable or if defendant, the prior indorser, was a holder in due course or a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), may not, on a motion for summary judgment, recover such payment from defendant pursuant to the warranty given by a customer of a payor bank with respect to the drawer's signature (Uniform Commercial Code, § 4-207, subd [1], par [b]) since triable questions of fact exist as to whether defendant had knowledge of the forgery, was a holder in due course or a person who in good faith changed his position in reliance on plaintiff's payment. Plaintiff's position is not improved by subrogation to the drawer's rights (Uniform Commercial Code, § 4-407, subd [c]) since a drawer's rights against a holder who has obtained payment of a check with a forged drawer's signature are even fewer than those of the payor bank, the limited warranty of section 4-207 (subd [1], par [b]) not being given to the drawer with respect to the drawer's own signature by any customer that is a holder in due course and acts in good faith. Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978).

Plaintiff drawee-payor bank is not entitled to summary judgment based on a breach of warranty of good title by defendant collecting bank (Uniform Commercial Code, § 4-207, subd [1]), which transferred to plaintiff checks lacking the indorsement of the named payees, since factual issues remain with respect to whether the drawer has the right to set up the missing indorsements as a bar to charging his account with the amounts of the checks. The checks, which were made out to fictitious payees, were credited to a corporate account even though the company was not the named payee. If the proceeds of the checks reached the entity intended to receive them, though made payable to variants of that entity's name, the drawer would be precluded from recovering as against plaintiff, which, in turn, would have no cause to proceed against defendant. In that event, any loss sustained would be attributable to plaintiff's voluntary decision to honor checks when its depositor's account had insufficient funds to cover them, and not to defendant's failure to secure necessary indorsements. Bank Leumi Trust Co. v. Marine Midland Bank, 93 Misc. 2d 41 (1977).

Where borrower obtained check, drawn to himself and automobile dealer, by misrepresenting to lender-drawer that he was purchasing automobile, and obtained payment of check upon forged indorsement of dealer from collecting bank, which forwarded check to drawee bank, which paid check to collecting bank and charged account of drawer, "imposter rule" of § 3-405 was not applicable as defense to drawee bank's action against collecting bank for repayment under § 4-207. East Gadsden Bank v. First City Nat'l Bank, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Defendant insurance company was not entitled to summary judgment in action by plaintiff bank seeking to recover amount charged back against plaintiff bank by another bank as a result of alleged forged endorsement on draft issued by insurance company, where insurance company produced evidence showing the forged endorsement and an eventual charge-back to plaintiff bank who warranted good title to the draft in question when it deposited it with the other bank, where there was a showing by plaintiff bank of genuine issues for trial. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Collecting bank is subject to suit by drawer for damages for breach of warranty resulting from payment of check on endorsement of less than all joint payees; defendants were authorized to implead collecting bank as third-party defendant, and entitled to summary judgment against bank, where third-party defendant bank cashed checks drawn by defendant-contractor payable jointly to plaintiff and subcontractor without plaintiff's endorsement. Insurance Co. of N. Am. v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

The final settlement of a deposited item, while terminating the collecting bank's right of charge-back in reliance upon a simple notification from the drawee bank, does not preclude the collecting bank from pursuing its remedies by way of plenary suit, in order to hold the depositor on its endorsement and the warranties connected therewith. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

A forged indorsement gives rise to a cause of action in favor of the drawee bank only if the drawer has the right to and does set up forgery as a bar to charge his account with the amount of the check. First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596 (1962).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of proving that the payee's indorsements had been forged. Krinsky v. Pilgrim Trust Co., 337 Mass. 401, 149 N.E.2d 665 (1958).

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Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

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6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:101-4:110 (Warranties of customer and collecting bank; on payment or acceptance).

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§ 75-4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered;

(3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized; and

(4) With respect to a remotely created check, that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration. If a drawee asserts a claim for breach of warranty under subsection (a)(4), the warrantor may defend by proving that the person on whose account the remotely created check is drawn is precluded under Section 75-4-406, as applicable, from asserting against the drawee the unauthorized issuance of the check.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Laws, 1992, ch. 420, § 90; Laws, 2010, ch. 506, § 30, eff from and after July 1, 2010.

Editor's Note — Provisions of this section are similar to provisions found in former § 74-4-207. Provisions formerly found in § 75-4-208 can now be found in § 75-4-210.

§ 75-4-209. Encoding and retention warranties.

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depositary bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depositary bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

SOURCES: Laws, 1992, ch. 420, § 91, eff from and after January 1, 1993.

Editor's Note — Provisions of this section are similar to provisions found in former § 74-4-207. Provisions formerly found in § 75-4-209 can now be found in § 75-4-211.

§ 75-4-210. Security interest of collecting bank in items, accompanying documents and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Title 75, Chapter 9, but:

(1) No security agreement is necessary to make the security interest enforceable (Section 75-9-203(b)(3)(A));

(2) No filing is required to perfect the security interest; and

(3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

SOURCES: Formerly § 75-4-208: Codes, 1942, § 41A:4-208; Laws, 1966, ch. 316, § 4-208; Laws, 1992, ch. 420, § 92; Laws, 2001, ch. 495, § 15; Laws, 2006, ch. 527, § 57, eff from and after July 1, 2006.

Editor's Note — Provisions of this section were formerly found in § 75-4-208. Provisions formerly found in § 75-4-210 can now be found in § 75-4-212.

Cross References — Holder in due course, see § 75-3-302.

Taking for value, see § 75-3-303.

Collecting bank as agent of owner of item, see § 75-4-201.

Bank as holder in due course, see § 75-4-211.

Enforcement of security interest, see § 75-9-601 et seq.

When security interest attaches, generally, see § 75-9-203.

Perfection of security interest, see § 75-9-308 et seq.

Priorities among conflicting security interests in same collateral, see § 75-9-322.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2.-5. [Reserved for future use.]

II. Under Former § 75-4-208.

6. In general; interest for credit withdrawn or applied.
7. —"Withdrawal."
8. Right of withdrawal as value.
9. Full interest regardless of withdrawal.
10. Advance on or against item.
11. Final settlement; realization of interest.
12. Practice and procedure.

I. Under Current Law.

1. In general.

Neither a Chapter 7 trustee nor a bank were entitled to summary judgment on the trustee's claim that wire transfers a petroleum company ("debtor") made to the bank less than 90 days before it declared bankruptcy to cover overdrafts that were due to a check kiting scheme were preferential transfers that could be recovered for the debtor's bankruptcy estate under 11 U.S.C.S. § 547(b). Events that occurred after the bank learned about the check kiting scheme raised issues of fact as to whether the transfers satisfied the bank's security interest in the kited checks under Miss. Code Ann. § 75-4-210, and whether the transfers constituted property of the debtor's bankruptcy estate. Henderson v. Cmty. Bank (In re Stinson Petroleum Co.), — Bankr. —, 2011 Bankr. LEXIS 1421 (Bankr. S.D. Miss. Apr. 12, 2011).

2.-5. [Reserved for future use.]

II. Under Former § 75-4-208.

6. In general; interest for credit withdrawn or applied.

Until there is final payment of an item, a collecting bank has a security interest under UCC § 4-208(1)(a) in any payment it may have made. Rapp v. Dime Sav. Bank, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

Where (1) defendant drawer issued check to named payee for work performed by payee, (2) payee deposited check in account with plaintiff collecting bank, (3) check was dishonored by drawee bank because of drawer's stop-payment order, and (4) drawer claimed that there was no consideration for check because payee had failed to complete work for which check was given, court held (1) that under UCC § 4-208(1)(a), plaintiff had security interest in check to extent to which credit given payee for check had been withdrawn or applied, (2) that plaintiff was entitled to recover loss caused by check's dishonor, and (3) that defendant drawer was primarily liable on such check. Hackett v. Broadway Nat'l Bank, 570 S.W.2d 184 (Tex. Civ. App. 1978).

Where customer deposited four checks drawn by defendant with plaintiff bank and bank credited customer's account, where bank then debited customer's account for amount of check written by customer, where defendant stopped payment on four checks and bank dishonored customer's check upon learning of customer's insolvency, and where bank exercised charge back rights by debiting customer's account for exact amount of four checks drawn by defendant, in action by bank against defendant for amount of four checks, bank was not entitled to recovery since bank had not given value for checks and was not a holder in due course within meaning of UCC § 4-208. Furthermore, bank's exercise of charge back rights under UCC § 4-212 made bank whole and recovery against defendant would permit double recovery in favor of bank. GMAC v. Bank of Carroll County, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depositary bank obtained certification of check from drawee bank, drawee bank subsequently notified depository bank that it was rescinding its certification, but depositary bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depositary bank was not "holder in due course" under UCC § 4-209 notwithstanding customer owed money to depositary bank and bank had right to set-off such indebtedness against customer's account; since check was "deposited in an account" and since credit given was never withdrawn or applied, depositary bank had no security interest in check under UCC § 4-208 and hence it had not given value under UCC § 3-303 or 4-209 at time it received notice of defense, it was not holder in due course under UCC § 4-209 and certification was not final in favor of depositary bank under UCC § 3-418. Rockland Trust Co. v. South Shore Nat'l Bank, 366 Mass. 74, 314 N.E.2d 438 (1974).

UCC § 4-208 provides for bank to acquire security interest in items presented for collection under certain circumstances; this security interest is considered to be "value" for purposes of becoming holder in due course of item, and if bank meets other requirements of UCC § 3-302 it can become holder in due course of "item and any accompanying documents or the proceeds of either." Commercial Disct. Corp. v. Milwaukee W. Bank, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

Where a customer deposits a check with his bank and immediately writes his own check in the same amount with which latter check he pays a note he owes to the bank, the bank becomes the holder for value of the original check. Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968).

A bank which allows credit on a deposited check has a security interest therein to the extent to which credit was withdrawn, and is a holder "for value." Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

A bank which allows its depositor to make withdrawals against a check it has received for collection has a security interest in the check to the extent of such withdrawals, and it becomes a holder for value of the item, and if its taking is subject to no other infirmities it becomes a holder in due course. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

By including §§ 4-208(1)(a) and 4-209, the draftsmen of the Uniform Commercial Code approved the majority rule at common law and under the Negotiable Instruments Law that where a bank customer deposits checks in his account, and the bank allows the customer to draw against the credit allowed for the checks, the bank is a holder in due course to the extent of its advances. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

7. —"Withdrawal."

Where collecting bank had paid out money on forged check by permitting withdrawals from fictitious account, credit allowed for check in fictitious account had been withdrawn within meaning of § 4-208, so that collecting bank was holder for value. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex.

Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

8. Right of withdrawal as value.

Exception to rule that mere crediting of bank customer's account for deposited check does not constitute giving of value for such check occurs when the credit, under UCC § 4-208(1)(b), is "available for withdrawal as of right," even though the credit is not drawn on. Under UCC § 4-213(4)(a), a credit is "available for withdrawal as of right" within reasonable time after bank learns of final settlement in collection process of check for which credit was given. Until such final settlement, in absence of any agreement between bank and depositor, bank should not be viewed as having given value until there is final payment of credited check. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

9. Full interest regardless of withdrawal.

Security interests are established where correspondent bank credits amounts stated in letters of credit against debts owed to it by manufacturers. Banco Espanol de Credito v. State St. Bank & Trust Co., 409 F.2d 711, 35 A.L.R.3d 1397 (1st Cir. Mass. 1969).

Bank has security interest in item to full extent of amount credited to account, regardless of whether withdrawals were made or not. Atlantic Ref. Co. v. Director of Pub. Works, 104 R.I. 436, 244 A.2d 853 (1968).

A bank accepting a forged check in satisfaction of an antecedent debt which acts in good faith and without notice of any infirmity in the instrument is entitled to receive payment thereof from the drawee bank. Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. Okla. 1964).

10. Advance on or against item.

A bank which cashes a check drawn on another bank has a security interest therein, and is a holder "for value." Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

11. Final settlement; realization of interest.

Under circumstances of case, where payment to bank by guarantor was made under express condition that bank would continue to attempt to recover from drawee, payment was not "final settlement" within UCC § 4-208(3) and was not a realization of the bank's security interest. First Nat'l Bank v. Jefferson Sales & Distribs., Inc., 341 F. Supp. 659 (S.D. Miss. 1971), aff'd, 460 F.2d 1059 (5th Cir. 1972) (applying Missouri UCC).

12. Practice and procedure.
In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

RESEARCH REFERENCES

ALR. Lien of bank upon commercial paper delivered to it by debtor for collection. 22 A.L.R.2d 478.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions§§ 842, 843, 848.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 977, 978.

11 Am. Jur. 2d, Bills and Notes § 183.

15A Am. Jur. 2d, Commercial Code § 8.

68A Am. Jur. 2d, Secured Transactions §§ 5, 30, 138.

69 Am. Jur. 2d, Secured Transactions §§ 168-170, 713, 714, 716.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:131, 4:132 (Security interest of collecting bank in items).

CJS. 9 C.J.S., Banks and Banking § 330, 409.

§ 75-4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of Section 75-3-302 on what constitutes a holder in due course.

SOURCES: Formerly § 75-4-209:Codes, 1942, § 41A:4-209; Laws, 1966, ch. 316, § 4-209; Laws, 1992, ch. 420, § 93, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-209. Provisions formerly found in § 75-4-211 can now be found in § 75-4-213.

Cross References — Holder in due course generally, see § 75-3-302.

When holder takes instrument for value, see § 75-3-303.

Collecting bank's security interest, see § 75-4-210.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-209.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-209.

6. In general.
Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depositary bank obtained certification of check from drawee bank, drawee bank subsequently notified depositary bank that it was rescinding its certification, but depositary bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depositary bank was not "holder in due course" under UCC § 4-209, notwithstanding customer owed money to depositary bank and

bank had right to set-off such indebtedness against customer's account. Rockland Trust Co. v. South Shore Nat'l Bank, 366 Mass. 74, 314 N.E.2d 438 (1974).

A bank which cashes a check drawn on another bank has a security interest and is a holder for value. Where the collecting bank had no actual knowledge that payment had been refused by another and nothing in drawer's past record would have put bank on notice of any infirmity in the check, bank was also holder in due course, since UCC § 3-302 test of notice is whether bank, from all the facts and circumstances of which it had actual knowledge at the time in question, acted as a reasonable commercial bank. Suit & Wells Equip. Co. v. Citizens Nat'l Bank, 263 Md. 133, 282 A.2d 109 (1971).

Because a bank pays value for the purposes of UCC § 3-302 holder in due course definition if it has a security interest in the item, a bank obtained a security interest in the plaintiff's check under UCC § 4-209 when it advanced $5,000 in cash on it. Nida v. Michael, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

Where a customer deposits a check with his bank and immediately writes his own check in the same amount with which latter check he pays a note he owes to the bank, the bank becomes the holder for value of the original check. Waltham Citizens Nat'l Bank v. Flett, 353 Mass. 696, 234 N.E.2d 739 (1968).

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. Peoples Bank v. Haar, 421 P.2d 817 (Okla. 1966).

It would hinder commercial transactions if depositors banks refused to permit withdrawal prior to clearance of checks, and it is clear that the UCC was intended to permit this practice and to protect banks which have given credit on deposited items prior to notice of a stop payment order or other notice of dishonor. Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

A bank accepting a negotiable instrument in satisfaction of an antecedent debt is a holder for value and in due course. Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. Okla. 1964).

By including §§ 4-208(1)(a) and 4-209, the draftsmen of the Uniform Commercial Code approved the majority rule at common law and under the Negotiable Instruments Law that where a bank customer deposits checks in his account, and the bank allows the customer to draw against the credit allowed for the checks, the bank is a holder in due course to the extent of its advances. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

RESEARCH REFERENCES

ALR. Crediting proceeds of negotiable paper to holder's deposit account as constituting bank holder in due course. 59 A.L.R.2d 1173.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 848, 962.

11 Am. Jur. 2d, Bills and Notes §§ 181, 182, 183, 250.

15A Am. Jur. 2d, Commercial Code § 8.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:141, 4:142 (Security interest of collecting bank in items; when bank gives value for purposes of holder in due course).

CJS. 9 C.J.S., Banks and Banking §§ 333, 407 et seq., 434, 436-438, 417.

§ 75-4-212. Presentment by notice of item not payable by, through, or at bank; liability of drawer or indorser.

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a record providing notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under Section 75-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under Section 75-3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

SOURCES: Formerly § 75-4-210: Codes, 1942, § 41A:4-210; Laws, 1966, ch. 316, § 4-210; Laws, 1992, ch. 420, § 94; Laws, 2010, ch. 506, § 31, eff from and after July 1, 2010.

Editor's Note — Provisions of this section were formerly found in § 75-4-210. Provisions formerly found in § 75-4-212 can now be found in § 75-4-214.

Cross References — Presentment and notice of dishonor, of commercial paper, generally, see § 75-3-501.

Collection of documentary drafts, see §§ 75-4-501, 75-4-502.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-210.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-210.

6. In general.

In a case in which it was held that the Negotiable Instruments Law did not abrogate the common-law rule that where an instrument was being collected by a bank on behalf of an indorsee, a written demand mailed by the bank to the maker of the instrument to pay the instrument at the bank on the due date was sufficient to make the offices of the bank the place of payment, so that the neglect of the maker to pay the note at the bank amounted to a dishonor of the instrument, a physical exhibition of the note not being required, it was said that the instant section, although not applicable to the case under consideration, would sanction the presentment procedure followed by the bank in the case under consideration. Batchelder v. Granite Trust Co., 339 Mass. 20, 157 N.E.2d 540 (1959).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 971, 972.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:151-

4:153 (Presentment to payor other than bank).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4-Bank Deposits and Collections, §§ 253:2291, 253:2292 (Presentment by notice of item not payable by, through, or at a bank).

§ 75-4-213. Medium and time of settlement by bank.

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by Federal Reserve regulations or circulars, clearinghouse rules, and the like, or agreement. In the absence of such prescription:

(1) The medium of settlement is cash or credit to an account in a Federal Reserve bank of or specified by the person to receive settlement; and

(2) The time of settlement is:

(i) With respect to tender of settlement by cash, a cashier's check, or teller's check, when the cash or check is sent or delivered;

(ii) With respect to tender of settlement by credit in an account in a Federal Reserve bank, when the credit is made;

(iii) With respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(iv) With respect to tender of settlement by a funds transfer, when payment is made pursuant to Section 75-4A-406(a) to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) or the time of settlement is not fixed by subsection (a), no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) Presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) Fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement, settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

SOURCES: Formerly § 75-4-211: Codes, 1942, § 41A:4-211; Laws, 1966, ch. 316, § 4-211; Laws, 1992, ch. 420, § 95, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-211. Provisions formerly found in § 75-4-213 can now be found in § 75-4-215.

Cross References — Settlements by debits and credits in accounts between banks, see § 75-4-213.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-4-211.
6. In general.
III. Decisions Under Former Statutes.
7. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-211.

6. In general.

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

In action by plaintiff customer against depositary and collecting bank for wrongfully debiting plaintiff's checking account with amount of certain dishonored checks that had apparently been forged, where plaintiff introduced evidence which might indicate that bank had dishonored some or all of such checks after its midnight deadline for taking such action under UCC § 4-211(2) and giving notice of dishonor under UCC § 3-508(2), trial court's premature entry of judgment for bank at conclusion of direct and cross-examination of plaintiff's only witness deprived plaintiff of opportunity to establish prima facie case of proper deposit of such checks and improper debit thereof, so as to shift burden to bank of going forward and showing that it had acted within reasonable time in debiting plaintiff's account without the statutorily required notice within 24 hours following day of deposit. Trading Assocs. v. Trust Co. Bank, 142 Ga. App. 229, 235 S.E.2d 661 (1977).

Under UCC § 4-211(1), a collecting bank may, with legal safety, accept any one of the mentioned forms of remittance in settlement of items, but UCC § 4-211(1) was not designed to require a collecting bank to accept any one or all of the forms of remittance mentioned therein; hence, amendments to Federal Reserve Regulation J, making remittance specified in UCC § 4-211(1)(a) no longer available as means of settlement for checks cleared through Federal Reserve System was not in conflict with Code. Community Bank v. Federal Reserve Bank, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

III. Decisions Under Former Statutes.

7. In general.

Duty of collecting bank to collect in money. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank cannot extend time of payment. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

Collecting bank held guilty of negligence and liable to payee for amount of check. Bank of Shaw v. Ransom, 112 Miss. 440, 73 So. 280 (1916).

Drawer is discharged where bank while solvent receives check for collection and charges it to him though it fails to pay over money to person from whom it was received. Planters' Mercantile Co. v. Armour Packing Co., 109 Miss. 470, 69 So. 293 (1915); Planters' Mercantile Co. v. Christian Peper Tobacco Co., 69 So. 295 (Miss. 1915); Schloss & Rothschild v. Haupt, 69 So. 295 (Miss. 1915).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 967, 972, 973, 976.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:161, 4:162 (Media of remittance; provisional and final settlement in remittance cases).

CJS. 9 C.J.S., Banks and Banking §§ 333, 434, 436-438, 417.

§ 75-4-214. Right of charge-back or refund; liability of collecting bank; return of item.

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depositary bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 75-4-301).

(d) The right to charge back is not affected by:

(1) Previous use of a credit given for the item; or

(2) Failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

SOURCES: Formerly § 75-4-212: Codes, 1942, § 41A:4-212; Laws, 1966, ch. 316, § 4-212; Laws, 1971, ch. 402, § 1; Laws, 1992, ch. 420, § 96, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-212. Provisions formerly found in § 75-4-214 can now be found in § 75-4-216.

Cross References — General obligation of good faith, see §§ 75-1-304, 75-4-103.

Satisfaction of promise or order to pay sum stated in foreign currency in commercial paper, see § 75-3-107.

Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

Settlement by means of remittance instrument or authorization to charge, when final, see § 75-4-213.

When settlement becomes final, generally, see § 75-4-215.

Deferred posting, see § 75-4-301.

Payor bank's liability to customer for wrongful dishonor of item, see § 75-4-402.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-212.

6. In general; refund of provisional credit.
7. Charge-back of credit.
8. —Proper notice of dishonor.
9. Charge-back by depositary bank.
10. Effect of charge-back.
11. Election of remedy.
12. Laches; delay in charge-back.
13. Practice and procedure.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-212.

6. In general; refund of provisional credit.

Plaintiff collecting bank, as agent under UCC § 4-201(1) of payee-owner of sight draft until settlement of draft became final, had right under UCC § 4-212(1) to refund of provisional credit given on draft after draft's dishonor, provided that plaintiff, as required by UCC § 4-211(3)(c), had seasonably presented or forwarded draft for collection before its midnight deadline. In such case, plaintiff was subject to both duty of ordinary care under UCC § 4-202(1)(a) and duty under UCC § 4-204(1) to use reasonably prompt method of presenting draft or forwarding it for presentment. Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449 (Tex. 1978) (holding that whether plaintiff had properly presented draft or forwarded it for presentment was issue to be resolved by jury, that plaintiff had not established proper presentment or forwarding for presentment as matter of law, but reversing and remanding case for new trial because of improper instructions to jury).

7. Charge-back of credit.

Where payee endorsed and deposited check in his account with bank, bank credited payee's account and forwarded check to foreign payor bank for payment, and payee withdrew full amount of deposit before dishonor of check by payor bank, payee remained owner of check and bank was agent for collection, so that credit given for deposit was only provisional settlement and risk of loss on check remained in payee as owner, and not upon agent bank; and bank's failure to make formal protest was immaterial since payee's liability was based not on his endorsement of check but on his status as depositor and withdrawer of funds. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Collection agent may charge back dishonored draft to account belonging to customer. Manufacturers Nat'l Bank v. Sutherland, 16 Mich. App. 286, 167 N.W.2d 894 (1969).

If the collecting bank has credited its customer's account with an item, but fails to receive a final settlement for the item, it may charge back the customer's account; and similarly upon receiving notification by the drawee bank of a forged endorsement, the collecting bank may properly refund the amount to the drawee bank, and charge back the amount against the customer's account. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

8. —Proper notice of dishonor.

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorses, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Collecting bank which received customer's deposit of bank draft payable through another bank and sent it for collection could, on item's dishonor, revoke provisional settlement made on deposit of item and charge back amount of credit given customer's account or obtain refund from customer if bank returned item to customer or sent notification of "facts" to him, as required by UCC § 4-212(1). In such case, the "fact" that entitled bank to revoke provisional settlement and charge back or obtain refund from customer was fact of item's dishonor, and bank was under duty to give notice to customer by bank's midnight deadline or within reasonable time after it learned fact of dishonor (stating that such interpretation of collecting bank's duty under UCC § 4-212(1) to give customer notice of dishonor was reinforced by UCC § 4-202(1)(b), which provides that collecting bank must use ordinary care in sending notice of dishonor to bank's transferor, and holding that such notice was given orally in instant case, as permitted by UCC § 3-508(3)). Salem Nat'l Bank v. Chapman, 64 Ill. App. 3d 625, 381 N.E.2d 741 (5th Dist. 1978).

Where (1) customer of branch bank of plaintiff bank deposited check payable to her in her checking account at branch bank on Monday, August 18, 1975, (2) check was promptly dishonored and returned by drawee bank to plaintiff bank on Tuesday, August 19, 1975, and (3) plaintiff bank did not send notice of such dishonor to branch bank until Monday, August 25, 1975, charge-back remedy under UCC § 4-212(1) was not available to plaintiff, even though branch bank is considered as separate bank for purpose of determining time limits under UCC Articles 3 and 4, since ordinary care required that plaintiff, by its midnight deadline on Wednesday, August 20, 1975, should have sent notice of check's dishonor to branch bank and that branch bank, in turn, should have sent notice of dishonor to defendant by branch bank's midnight deadline on Thursday, August 21, 1975, instead of giving notice to defendant on Monday, August 25, 1975. Manufacturers Hanover Trust Co. v. Akpan, 91 Misc. 2d 622 (1977).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depositary bank where collecting bank gave depositary bank only oral notice of dishonor; although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. Valley Bank & Trust Co. v. First Sec. Bank, 538 P.2d 298 (Utah 1975).

Even if bank's settlement for check had been provisional, where bank conceded that it neither sent written notice of dishonor nor returned check before "midnight deadlines", bank had no right to charge item back to payee's account. Kirby v. First & Merchants Nat'l Bank, 210 Va. 88, 168 S.E.2d 273 (1969) (recognizing rule).

9. Charge-back by depositary bank.

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depositary bank from charging amount of item back to its depositor upon subsequent dishonor of check. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

10. Effect of charge-back.

Where customer deposited four checks drawn by defendant with plaintiff bank and bank credited customer's account, where bank then debited customer's account for amount of check written by customer, where defendant stopped payment on four checks and bank dishonored customer's check upon learning of customer's insolvency, and where bank exercised charge back rights by debiting customer's account for exact amount of four checks drawn by defendant, in action by bank against defendant for amount of four checks, bank was not entitled to recovery since bank had not given value for checks and was not a holder in due course within meaning of UCC § 4-208. Furthermore, bank's exercise of charge back rights under UCC § 4-212 made bank whole and recovery against defendant would permit double recovery in favor of bank. GMAC v. Bank of Carroll County, 138 Ga. App. 654, 226 S.E.2d 815 (1976).

11. Election of remedy.

Bank was acting as both depository and collecting bank under UCC § 4-105 so as to have right under UCC § 4-212 to charge payees' account or obtain refund for money advanced on basis of treasury bills, where treasury bills were dishonored after payees were allowed to overdraw their account by amount to be received for bills discounted and sold through normal market channels. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

12. Laches; delay in charge-back.

UCC § 4-212(5) does not provide that collecting bank can charge back item at any time after it has learned of facts, such as stop payment order, but means that once fact is known, bank must promptly exercise its right to charge back; collecting bank did not exercise its right of charge back promptly where it waited 29 days after it received notice that check had been dishonored before exercising right to charge back. First State Bank & Trust Co. v. George, 519 S.W.2d 198 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 11, 1975).

Bank did not fail to use ordinary care as required by UCC §§ 4-202(1) and 4-103(5) and, thus, did not lose its right to charge back amount of uncollected check under UCC § 4-212(1)(4) where customer deposited check on November 24 and on same day bank forwarded it to its depositary, where customer was informed that check had not cleared on December 3 and that he was permitted to withdraw against it pursuant to bank's standard practice since ten-day period for clearance was due to elapse on next day, and where on December 21 bank promptly notified customer when check was returned as dishonored. Isaacs v. Chartered New England Corp., 378 F. Supp. 370 (S.D.N.Y. 1974) (applying New York law).

Where corporate check, which was payable to plaintiff and was made out by her dying husband on corporate account, was deposited in her account in same bank on which check was drawn, and plaintiff's stepson, acting for corporation, stopped payment on check, but bank did not charge back and reverse plaintiff's provisional credit before midnight of banking day following receipt or send written notice until seven days later, plaintiff had absolute right to draw upon funds, and payment of item had become final by passage of time. However, bank was subrogated to corporate drawer's rights against plaintiff notwithstanding fact that bank never debited corporate account and fact that trial court granted summary judgment in favor of corporate drawer against bank, which was final and nonvacatable, thus preventing corporate drawer from suffering any loss. Sunshine v. Bankers Trust Co., 34 N.Y.2d 404, 314 N.E.2d 860 (1974).

13. Practice and procedure.

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of proving that the payee's indorsements had been forged. Krinsky v. Pilgrim Trust Co., 337 Mass. 401, 149 N.E.2d 665 (1958).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 882, 927, 977, 978.

11 Am. Jur. 2d, Bills and Notes § 622.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:171-4:174 (Media of remittance; right of chargeback or refund).

CJS. 9 C.J.S., Banks and Banking §§ 333, 408, 431, 434, 436-438, 417.

§ 75-4-215. Final payment of item by payor bank; when provisional debits and credits become final; when certain credits become available for withdrawal.

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

(1) Paid the item in cash;

(2) Settled for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement; or

(3) Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) If the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time;

(2) If the bank is both the depositary bank and the payor bank, and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.

(f) Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

SOURCES: Formerly § 75-4-213: Codes, 1942, § 41A:4-213; Laws, 1966, ch. 316, § 4-213; Laws, 1992, ch. 420, § 97, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-213.

Cross References — Finality of payment or acceptance of commercial paper, see § 75-3-418.

Cutoff hour for handling of money and items, see § 75-4-107.

Duration of status of collecting bank as agent of owner, see § 75-4-201.

Settlement by means of remittance instrument or authorization to charge, see § 75-4-213.

Charge-back or refund with respect to provisional settlements, see § 75-4-214.

Final payment by payor bank as fixing preferential rights, see § 75-4-216.

Deferred posting, statutory right of payor bank to revoke settlement, see § 75-4-301.

Payor bank's accountability for late return of item presented on or received by it, see § 75-4-302.

Effect of receipt of notice, stop order, legal process, after final payment of item, see § 75-4-303.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-213.

6. In general.
7. "Accountable."
8. Payor bank's payment in cash.
9. —Completion of posting process.
10. —Delay in revoking provisional settlement.
11. Effect of payor bank's accountability.
12. Collecting bank's liability.
13. Withdrawal as of right; settlement of item.
14. Practice and procedure.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-213.

6. In general.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and set offs (UCC § 4-303(1)). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Language of UCC § 4-213(1) is oriented to time of payment and not legal effect of payment. Phrase "finally paid" suggests act in particular sequence of acts that establishes time of payment, and word "when" refers only to time of payment. In other words, the statute does not deal with the problem of when is payment final so that bank cannot recover back money paid out; it deals only with the problem of when checks are paid for limited purposes. Demos v. Lyons, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

7. "Accountable."

In construing UCC § 4-213(1)(a)-(d), the word "accountable," which is not defined in the Uniform Commercial Code, does no more than put subdivision (b), (c), and (d) noncash payments on a par with subdivision (a) cash payments. The last sentence in UCC § 4-213(1), following subdivision (d), simply means that noncash payments have the same legal effect as cash payments. However, it does not follow that the payor bank's "accountability" as to (b), (c), and (d) payments should deprive the payor bank of its right to restitution as to any of such payments, much less all of them. This, in turn, leads to the further conclusion that even if UCC § 4-213(1) is considered to be a rule of law, its silence as to common-law restitution cannot be read as abolishing such restitution. Demos v. Lyons, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

8. Payor bank's payment in cash.

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depositary-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Plaintiff bank was not entitled to recover $3,025 which defendant received as proceeds of cashier's check issued to defendant by bank where defendant used personal check of one of bank's customers in same amount as cashier's check as payment for cashier's check and where bank's customer subsequently stopped payment on his check; when bank accepted its customer's check as payment for cashier's check, customer's check was paid in cash without any reservation of right to revoke settlement under UCC § 4-213(1)(a) and (b); thus, bank erred to its own prejudice when it did not inform its customer that his stop payment order came too late under UCC § 4-303(1)(b), and in honoring stop payment order when it was received too late. Citizens & S. Nat'l Bank v. Youngblood, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

Where bank paid check in cash, it then made final payment and could not sue payees of check except for breach of warranty. Kirby v. First & Merchants Nat'l Bank, 210 Va. 88, 168 S.E.2d 273 (1969).

9. —Completion of posting process.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of Price v. Neal (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank. United States v. Pavloski, 574 F.2d 933 (7th Cir. Wis. 1978) (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based).

Where bank had made final posting of check under UCC § 4-109 and then wrongfully reversed it, bank was liable to payee. H. Schultz & Sons v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977).

Collecting bank was entitled to recover amount of deficiency from drawee bank where drawee bank paid encoded amount of under-encoded check, notwithstanding drawer's instruction to drawee bank after cancelled check had been returned to drawer and after drawer was informed of encoding error that drawee was not to "bother" his account; since posting check constituted final payment within meaning of UCC § 4-213(1) and since drawee bank retained check under UCC § 4-302 past its midnight deadline without completely settling for it, drawee bank was liable for face amount of check and drawer lost right to stop payment thereon. Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co., 139 Ga. App. 683, 229 S.E.2d 482 (1976), aff'd, 238 Ga. 693, 235 S.E.2d 1 (1977).

In action by depositary bank against payor bank to determine defendant's accountability to plaintiff on check, where (1) defendant's computer determined that there were insufficient funds in account of drawer of check and did not automatically debit such account, and (2) defendant's personnel examined check and computer's insufficient-funds printout, received advice to pay check notwithstanding lack of funds in drawer's account, physically marked check "paid," and charged drawer's account by processing check as overdraft, court held (1) that at time overdraft was created against drawer's account, defendant had decided to pay check and had recorded its decision, and (2) as a result, defendant under UCC § 4-213(1)(c) made final payment of check by completing process of posting and thus was accountable to plaintiff for amount of check. North Carolina Nat'l Bank v. South Carolina Nat'l Bank, 449 F. Supp. 616 (D.C.S.C. 1976), aff'd, 573 F.2d 1305 (4th Cir. S.C. 1978), cert. denied, 439 U.S. 985, 99 S. Ct. 577, 58 L. Ed. 2d 657 (1978).

Even though check was "improperly" paid by payor bank under UCC § 4-403, after bank received stop payment order from its customer, check was nonetheless "finally" paid under § 4-213 when customer's account was charged with item; when check was honored by payor bank, provisional settlement received by payee's bank for item became final and money became available for withdrawal by payee as matter of right. Aljax Corp. v. Connecticut Mut. Life Ins. Co., 458 Pa. 57, 333 A.2d 469 (1974).

The process of posting is not completed by virtue of the fact that the drawee bank had verified the signature on the check, determined that the account was sufficient to pay for check, marked the check paid, and filed it in the customer's file for return to him. West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis. 2d 661, 155 N.W.2d 587 (1968).

10. —Delay in revoking provisional settlement.

Whether a payor bank has finally paid an item depends on whether it has performed any of the affirmative acts defined in UCC § 4-213(1)(a)-(c). Where a payor bank does not act affirmatively under subsections (a)-(c), its inaction by failing to revoke a provisional settlement constitutes final payment under UCC § 4-213(1)(d). Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Under UCC § 4-213(2), final payment of a check "firms up" all of the provisional settlements that have been made in the collection process. Under UCC § 4-213(1)(d) and Official Comment 6, a payor bank makes final payment of a check when it fails to revoke a provisional settlement in the time and manner permitted by statute, clearinghouse rule, or agreement. As to items not presented over the counter or by local clearinghouse, this means that a payor bank is deemed to have made final payment of a check when it fails to revoke a provisional settlement by its midnight deadline. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

11. Effect of payor bank's accountability.

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depositary bank from charging amount of item back to its depositor upon subsequent dishonor of check. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

12. Collecting bank's liability.

With respect to rights of true owner of negotiable instrument which has been collected and payed on forged endorsement, money received by collecting bank and mingled with bank's funds is traceable by proper claimant into those funds; and so long as amount of cash on hand at bank is not diminished below amount of claimant's money that has been mingled with fund, defendant collecting banks must be deemed to retain proceeds of instruments transferred by forger, regardless of whether those instruments were cashed or accepted for deposit. Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Once a final settlement has taken place, the collecting bank is no longer an agent, but has been credited with the proceeds of the item, and a debtor-creditor relationship with its customer ensues. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

13. Withdrawal as of right; settlement of item.

Where (1) bank pursuant to valid safekeeping receipt held United States treasury bonds belonging to union trust fund for collection, (2) such receipt provided that bank would act only as its depositor's collecting agent and that collected proceeds of bonds would be disbursed only according to directions of fund's trustees, (3) bank collected proceeds of bonds, but

(4) trustees failed to give bank any directions for disbursing such proceeds, bank's agency relation terminated and its contractual obligations were fulfilled when, after collecting bonds' proceeds, it made proper payment thereof to trustees under UCC § 4-213(4)(a) by crediting amount of proceeds to union's trust account and such funds became available to trustees for withdrawal as of right. Bieze v. Coca, 54 Ill. App. 3d 7, 369 N.E.2d 106 (1st Dist. 1977).

Exception to rule that mere crediting of bank customer's account for deposited check does not constitute giving of value for such check occurs when the credit, under UCC § 4-208(1)(b), is "available for withdrawal as of right," even though the credit is not drawn on. Under UCC § 4-213(4)(a), a credit is "available for withdrawal as of right" within reasonable time after bank learns of final settlement in collection process of check for which credit was given. Until such final settlement, in absence of any agreement between bank and depositor, bank should not be viewed as having given value until there is final payment of credited check. Marine Midland Bank-New York v. Graybar Elec. Co., 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

A bank incurred no liability in declining payment against uncollected drafts before settlement became final; refusal of the bank to pay these drafts did not constitute wrongful dishonor. Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

14. Practice and procedure.

Thrift institution's time restrictions on making withdrawals against deposits into customer's checking account, which provided that proceeds of deposit of checks would not be available to depositor for six business days for local checks and fifteen business days for nonlocal checks, (1) were not manifestly unreasonable within meaning of UCC § 4-103(1), and (2) were fully in accord with general banking usage and therefore comported with exercise of ordinary care within meaning of UCC § 4-103(3). Furthermore, issue of reasonableness of such restrictions was not controlled by UCC § 4-204(1) or § 4-213(4)(a). Rapp v. Dime Sav. Bank, 64 A.D.2d 964 (2d Dep't 1978), aff'd, 48 N.Y.2d 658, 421 N.Y.S.2d 347, 396 N.E.2d 740 (1979).

In action by payee bank against payor bank for wrongfully dishonoring check payable to plaintiff, summary judgment for defendant was proper where check never went through final steps in defendant's payment process, as indicated by fact that check did not have "paid" stamped across its face and back of check was stamped "drawn against uncollected funds." In such case, check was not finally paid under UCC § 4-213(1)(c), dealing with completing process of posting item to drawer's account, and defendant was not liable to plaintiff for amount of check. Barnett Bank v. Capital City First Nat'l Bank, 348 So. 2d 643 (Fla. App. 1977).

In suit by bank against stakeholder of seller and buyer, where (1) buyer gave stakeholder check for $25,000 to hold as deposit on buyer's purchase of restaurant from seller, (2) bank paid such check even though doing so created $9,600 overdraft against buyer's account, and (3) bank was aware that payment of check would create such overdraft, bank assumed risk that buyer would not cover check and thus waived any claim of a mistaken belief that buyer had covered it. Accordingly, bank was not entitled to recover amount of overdraft from stakeholder even though UCC § 4-213(1) did not diminish payor bank's common-law right of restitution. Demos v. Lyons, 151 N.J. Super. 489, 376 A.2d 1352 (L. Div. 1977).

In suit by plaintiff customer against bank to recover amount of check allegedly paid by bank in defiance of plaintiff's stop-payment order, where check was initially presented to and paid by bank on January 9, 1975; where plaintiff later complained to bank that check had improper indorsement, and bank on June 24, 1975 notified plaintiff that its account had been recredited with amount of check and that bank had placed stop-payment order on check; where bank also sent plaintiff stop-payment order form which plaintiff duly executed and returned to bank on June 26, 1975; where plaintiff on December 5, 1975 wrote bank that stop-payment order was still in effect; and where bank on January 2, 1976, again received same check for payment, paid it despite fact that this time it had different indorsement (that of named payee), and redebited plaintiff's account with amount of check, trial court's judgment that stop-payment order was still in effect when bank paid check second time and that such payment was error would be affirmed because (1) nothing in record suggest any irregularity or misconstruction by bank with respect to such stop-payment order and its purpose; and (2) defendant's contention that check had been "finally paid" under UCC § 4-213(1)(b) and (c) and UCC § 4-303(1)(c) and (d) on January 9, 1975, and that such "final payment" had priority over plaintiff's subsequent stop-payment order, could not be sustained, since such stop-payment order related not to payment made on January 9, 1975, but to payment made on January 2, 1976. In such case, it was incongruous for bank to contend that it could rightfully pay check again because it had already "finally paid" it. Trust Co. v. Student Air Travel Agency, Inc., 142 Ga. App. 248, 235 S.E.2d 670 (1977).

Where bank, which was both payor bank and depositary bank as to two checks representing estate funds which were deposited by payee in payee's checking account with bank, had only reserved under payee's deposit contract right to charge back any item before final payment, and where bank did not attempt to recover estate funds represented by such checks until nine days after bank had received checks, final payment of such checks had already occurred under UCC § 4-213(1)(d) before bank attempted to recover such funds. However, in payee's suit against bank under UCC § 4-402 for dishonoring checks written by payee against his account after the two checks representing estate funds in issue had been deposited in payee's account, court would reverse summary judgment for bank and remand cause for new trial on issue of bad faith of payee in participating in deposit of such funds in payee's account in violation of court decree in estate proceeding. Bartlett v. Bank of Carroll, 218 Va. 240, 237 S.E.2d 115 (1977) (observing that UCC Art 4 neither specifically contemplates nor excludes recovery by bank after final payment of item when person receiving the credit has acted in bad faith).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warrants of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

After final settlement, and the charging of the amount of the check against the drawer's account, a voluntary refund by the collecting bank is at its own peril, for there are defenses it could interpose to resist payment. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

A trust company which credited a customer's account with the amount of three checks later returned to it by the drawee bank, because the payee's indorsements were allegedly forged, and which charged back the amount of the checks against its customer's account, had, in an action against it by the customer, the burden of proving that the payee's indorsements had been forged. Krinsky v. Pilgrim Trust Co., 337 Mass. 401, 149 N.E.2d 665 (1958).

RESEARCH REFERENCES

ALR. What constitutes final payment under UCC § 4-213. 23 A.L.R.4th 203.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 762, 770-772.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 962-966, 969, 972 et seq., 977, 978.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:181-4:184 (Media of remittance; final payment of item by payor bank).

CJS. 9 C.J.S., Banks and Banking §§ 425, 429, 430, 416.

§ 75-4-216. Insolvency and preference.

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(c) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank.

SOURCES: Formerly § 75-4-214: Codes, 1942, § 41A:4-214; Laws, 1966, ch. 316, § 4-214; Laws, 1992, ch. 420, § 98, eff from and after January 1, 1993.

Editor's Note — Provisions of this section were formerly found in § 75-4-214.

Cross References — Provisions of code as severable in event any provision or clause or application thereof held invalid, see § 75-1-105.

Settlement by means of remittance instrument or authorization to charge, see § 75-4-213.

Settlement with right to revoke, provisional settlement between presenting and payor banks, see § 75-4-215.

Regulation of insolvent banks, generally, see § 81-9-1 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-214.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-4-214.

6. In general.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and setoffs (UCC § 4-303(1)). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Although doubt may exist as to the validity of this section in providing for preferences in the event of the insolvency of a bank, the severability provisions of the UCC would leave unaffected the validity of § 4-302 which fixes the payor's responsibility for late return of an item. Rock Island Auction Sales, Inc. v. Empire Packing Co., 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 851.

11 Am. Jur. 2d, Banks and Financial Institutions § 980.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:191-4:193 (Media of remittance; insolvency and preference).

CJS. 9 C.J.S., Banks and Banking §§ 172, 173, 199, 205-208, 294, 295.

PART 3.

COLLECTION OF ITEMS: PAYOR BANKS.

SEC.

75-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.

75-4-302. Payor bank's responsibility for late return of item.

75-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.

§ 75-4-301. Deferred posting; recovery of payment by return of items; time of dishonor; return of items by payor bank.

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) Returns the item;

(2) Returns an image of the item, if the party to which the return is made has entered into an agreement to accept an image as a return of the item and the image is returned in accordance with that agreement; or

(3) Sends a record providing notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a).

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) As to an item presented through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with clearinghouse rules; or

(2) In all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

SOURCES: Codes, 1942, § 41A:4-301; Laws, 1966, ch. 316, § 4-301; Laws, 1992, ch. 420, § 99; Laws, 2010, ch. 506, § 32, eff from and after July 1, 2010.

Cross References — When item has been finally paid by payor bank, see § 75-4-215.

Payor bank's accountability for late return of item presented on or received by it, see § 75-4-302.

JUDICIAL DECISIONS

1. In general.

Under UCC § 4-301(1)(a), the payor bank, in order to revoke a provisional settlement for an item, must return the item before the bank has made final payment and before its midnight deadline. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

In action by bank against customer to recover overdraft created when bank charged back amount of dishonored check to customer's account, where (1) check in suit, which was drawn by corporation on its account with plaintiff's Wilmington branch and made payable to defendant, was presented by defendant on Friday, March 18, 1977, at Wilmington branch, after its cutoff hour, for deposit in defendant's account with plaintiff's High Point branch, thereby making check legally presented on Monday, March 21, 1977, (2) check was processed at plaintiff's eastern operations center on March 21, 1977, and processing included wiring deposit to plaintiff's western operations center for provisional credit to defendant's account with High Point branch and debiting of drawer's account at eastern operations center for amount of check, (3) on March 22, 1977, plaintiff's "Transactions not Posted Report" listed check as nonposted because of insufficient funds, and it was returned on same day to plaintiff's western operations center for charge-back to defendant's account, (4) on March 23, 1977, western operations center received check, charged it back to defendant's account, and mailed it, along with notice of its dishonor, to defendant, and (5) defendant in the meantime had written check on his account, with result that charge-back created overdraft as to which defendant refused to reimburse plaintiff, court held (1) that under UCC § 4-106, dealing with treatment of branch bank as separate bank for purpose of computing time within which, and place at which, action may be taken or notices given under the code, both High Point and Wilmington branches of plaintiff bank were entitled to separate bank status, (2) that since Wilmington branch was payor bank in the transaction, before it could revoke any provisional settlement, it had to comply with UCC § 4-301(4)(b), which provides that an item is "returned" when it is sent or delivered to the bank's transferor, (3) that since defendant had presented check for deposit in his High Point account, that branch was both collecting bank and transferor of check for collection and thus entitled to its return or notice of its dishonor, (4) that payor bank (Wilmington branch) had preserved its right to revoke provisional settlement for check by returning it to collecting bank (High Point branch) before payor bank had made final payment and before its midnight deadline, as required by UCC § 4-301(1)(a), and (5) that since collecting bank (High Point branch), which had given defendant provisional settlement for check, received returned check for charge-back on March 23, 1977, and mailed both check and notice of its dishonor to defendant on same day, it acted well within its midnight deadline under UCC § 4-212(1) and, having received no final settlement on check, was entitled to charge it back against defendant's account to cover overdraft. North Carolina Nat'l Bank v. Harwell, 38 N.C. App. 190, 247 S.E.2d 720, 5 A.L.R.4th 928 (1978), review denied, 296 N.C. 410, 267 S.E.2d 656 (1979).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depositary-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

If a payor bank fails to take the action required by UCC § 4-301(1) within the time limits prescribed therein, it is accountable for the amount of the item under UCC § 4-302(a) if it retains the item beyond midnight of the banking day of receipt without settling for the item or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. Dozier v. First Ala. Bank, 363 So. 2d 781 (Ala. Civ. App. 1978).

Where (1) absconding horse trainer, after establishing checking account with defendant bank, obtained arrangement with defendant under which he was allowed to cover his checks as presented on a daily basis and thereafter covered with cash deposits all of his overdrafts up to December 20, 1973, (2) plaintiff racetrack cashed 29 checks drawn by trainer prior to to his absconding and presented such checks for payment to defendant between December 20, 1973 and January 3, 1974, (3) defendant became uneasy on January 2, 1974 about trainer's failure to cover checks on daily basis and returned all 29 checks, each inscribed "Refer to maker," to federal reserve bank on January 4, 1974, and (4) 20 of such checks had been presented prior to January 3, 1974, while nine were presented on January 3, 1974, defendant was liable under UCC § 4-301(1)(a) and § 4-302(a) to plaintiff racetrack for balance due on the 20 checks that had been presented to defendant before January 3, 1974 because of defendant's failure to return such items by its midnight deadline. However, defendant was not liable under any legal theory, regardless of its deviation from good banking practices in handling trainer's account, for the nine checks that had been returned before expiration of defendant's midnight deadline, since defendant's duty to payees or holders of such checks was limited to compliance only with Uniform Commercial Code requirements pertaining to dishonor and return of bad checks. Pennsylvania Nat'l Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196, 385 A.2d 932 (App. Div. 1978), certification denied, 77 N.J. 506, 391 A.2d 520 (1978).

Payor bank which did not return before its midnight deadline check that was represented to it for payment, after such check had previously been dishonored by payor bank for insufficient funds, was not excused by UCC § 3-511(4) for not meeting midnight deadline because excuse rule of UCC § 3-511(4) applies only to time items, such as drafts, which has been dishonored by nonacceptance, and does not apply to demand items, such as checks, which have been dishonored by nonpayment. Furthermore, since check was not being held for protest, payor bank under UCC § 4-301(1) could revoke provisional settlement for check only by returning it before bank's midnight deadline and not by giving notice of check's dishonor. Therefore, even assuming that further notice of dishonor when check was re-presented was necessary to make drawer liable on check or to revive drawer's liability on underlying contract of sale, provisions of UCC § 3-511(4) excusing notice of dishonor could not apply because notice of dishonor was not available to payor bank as means of revoking its provisional settlement for check. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

UCC § 4-302 defines extent of payor bank's liability for failure to meet its midnight deadline. Whether or not payor bank has met its midnight deadline, however, is determined by UCC § 4-301, not UCC § 4-302. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Under UCC § 4-301(1), written notice of dishonor of a check is a permissible method of revoking a provisional settlement for the check only if the check is either unavailable for return or is being held for protest. In all other cases, the check itself must be returned. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Uniform Commercial Code, like former Model Deferred Posting Statute, seeks to decrease, rather than increase, risk of liability to payor banks. By permitting deferred posting under UCC § 4-301(1), Uniform Commercial Code extends time within which payor bank must determine whether it will pay check drawn on bank.

UCC § 4-301(1) does not require payor bank to act on day of receipt of check or within 24 hours of its receipt; instead, payor bank need not take action until midnight of next business day following business day on which it received check. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Under UCC § 4-301(1), payor bank may revoke provisional settlement for check if it takes such action before its midnight deadline, which is midnight of next banking day following banking day on which it received check. However, under UCC § 4-302(a), if payor bank misses its midnight deadline, it is accountable for face amount of check. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Payor bank which failed to dishonor and return check before its midnight deadline was liable for amount of check under UCC § 4-301(1)(b) and UCC § 4-302(a). Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y., 59 A.D.2d 645 (4th Dep't 1977).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. Berman v. United States Nat'l Bank, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

In prosecution for drawing check against insufficient funds with intent to defraud, bank was at liberty to disclose records of defendant's account, where, under UCC §§ 4-301 and 4-302, defendant's act of drawing check on account which had been closed for over one year subjected bank to potential liability for amount of check, and where, therefore, defendant had no overriding expectation of privacy with respect to bank records relating to status of his account. People v. Johnson, 53 Cal. App. 3d 394 (3d Dist. 1975).

Subpoena duces tecum served on bank directing it to turn over to government certain checks that had been stolen in robbery would not be enforced where, under UCC § 4-301(1), bank was required to return check prior to its midnight deadline if it intended to dishonor check and where, under UCC § 4-302, bank could be held liable for face amount of check if it failed to act promptly and consistently with such requirements. United States v. Loskocinski, 403 F. Supp. 75 (E.D.N.Y. 1975) (applying New York law).

A triable issue of fact as to whether a check described in plaintiff's cause of action was dishonored or returned during the period ending at midnight of the bank's business day next following the day of receipt of the check for deposit precluded granting defendant's motion for summary judgment. Jacobson v. First Nat'l City Bank, 29 A.D.2d 514 (1st Dep't 1967).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. Community Bank v. Federal Reserve Bank, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S.

Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 847 et seq.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 962-987.

11 Am. Jur. 2d, Bills and Notes §§ 318-327.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:201-4:205 (Collection of items; payor banks; deferred posting).

CJS. 9 C.J.S., Banks and Banking §§ 278, 279, 332, 340-344, 350, 360, 364-366, 372, 425, 430.

§ 75-4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) A demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) Any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) is subject to defenses based on breach of a presentment warranty (Section 75-4-208) or proof that the person seeking enforcement of the liability presented or transferred the item for the purpose of defrauding the payor bank.

SOURCES: Codes, 1942, § 41A:4-302; Laws, 1966, ch. 316, § 4-302; Laws, 1992, ch. 420, § 100, eff from and after January 1, 1993.

Cross References — Effect of this section on liability of "obligated bank" to claimant, see § 75-3-312.

Time limits within which payor bank must act, see § 75-4-301.

JUDICIAL DECISIONS

1. In general; relationship to other code sections.
2. Payor bank.
3. "Midnight deadline."
4. Liability for late return.
5. —Documentary drafts.
6. —Proper notice of dishonor.
7. Effect of late return.
8. Defense; settlement.
9. Excuse.
10. Practice and procedure.
11. —Damages, attorney's fees.

1. In general; relationship to other code sections.

The policy behind UCC § 4-302 is to reduce "float" and encourage the prompt return of dishonored checks, so that there will be a minimum of sand in the wheels of the bank collection system as it processes millions of items each day. Idah-Best, Inc. v. First Sec. Bank, 99 Idaho 517, 584 P.2d 1242 (1978).

Under UCC § 4-301(1), payor bank may revoke provisional settlement for check if it takes such action before its midnight deadline, which is midnight of next banking day following banking day on which it received check. However, under UCC § 4-302(a), if payor bank misses its midnight deadline, it is accountable for face amount of check. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

UCC § 4-302 defines extent of payor bank's liability for failure to meet its midnight deadline. Whether or not payor bank has met its midnight deadline, however, is determined by UCC § 4-301, not UCC § 4-302. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977).

Amendments to Federal Reserve Regulation J, governing collection of checks and other items by Federal Reserve Banks, making payor bank accountable if it fails to settle for demand items before close of its banking day of receipt, and providing that only if settlement has been made by this time may payor bank revoke prior to midnight of banking day of receipt, were not inconsistent with UCC § 4-302, making payor bank accountable if it retains item beyond midnight of banking day of receipt without settling for it, or UCC § 4-301, allowing payor banks to revoke provisional settlement if such revocation is made before its midnight deadline, insofar as such amendments affected payor banks that were not members of, or affiliated with, Federal Reserve System since UCC § 4-103(1) permits variation of Code's provisions by agreement, and UCC § 4-103(2) provides that Federal Reserve Regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements whether or not specifically assented to by all parties interested in items handled; UCC § 4-103(2) does operate to make Federal Reserve Regulations binding on nonmember, payor banks which affiliate themselves with Federal Reserve's check collection process. Community Bank v. Federal Reserve Bank, 500 F.2d 282 (9th Cir. Cal. 1974), cert. denied, 419 U.S. 1089, 95 S. Ct. 680, 42 L. Ed. 2d 681 (1974), amended, 525 F.2d 690 (9th Cir. 1975) (applying California law).

2. Payor bank.

New York bank was not payor bank or drawee of drafts drawn by plaintiff and forwarded to New York bank for collection, and, thus, was not liable under UCC § 4-302 for retaining drafts beyond prescribed time limits where names of both bank and its customer were included in space used for name of drawee, where transmittal letters from forwarding banks stated that customer was "payer" of draft or that it was drawn on customer, and where, since customer never authorized bank to make payments out of its account on drawer's order, there was no account out of which drawer could order bank to make payment. Wilhelm Foods, Inc. v. National Bank of N. Am., 382 F. Supp. 605 (S.D.N.Y. 1974) (applying New York law).

3. "Midnight deadline."

In action by payee of check drawn on, and dishonored by, defendant Hailey branch of First Security Bank of Idaho, in which payee alleged that defendant had failed to return check or give notice of its dishonor before defendant's midnight deadline, where (1) payee deposited check on Friday, October 31, 1975, in its account with Twin Falls bank (not a part of First Security Bank of Idaho) and received provisional credit for such deposit, (2) Twin Falls bank, acting as payee's agent for collection, mailed check on Monday, November 3, 1975, to Boise branch of First Security Bank of Idaho for deposit in its commercial check-clearing account with Boise branch and received provisional credit for such deposit, (3) check arrived at Boise branch on Tuesday, November 4, 1975, and was sent to First Security Bank's data processing center, which was located in basement of First Security's Boise branch and performed numerous functions for both the Boise and Hailey branches, (4) on night of November 4, 1975, name of bank on which check was drawn and check's account number were sent to First Security Bank's computer at

Salt Lake City, Utah, which informed data processing center at Boise branch that check's account contained insufficient funds to pay check, (5) on Wednesday, November 5, 1975, Boise branch sent check to defendant Hailey branch, (6) on Thursday, November 6, 1975, Hailey branch dishonored check, stamped "refer to maker" on it, and returned it to Boise branch with a clearings letter that effected reversal of provisional credit previously given to Boise branch and provisional debit given to defendant Hailey branch, (7) on Monday, November 10, 1975, Boise branch debited Twin Falls bank's account at Boise branch for check's amount and sent check to Twin Falls bank, (8) on Wednesday, November 12, 1975, Twin Falls bank received check and sent payee notice of dishonor on following day, and (9) payee received such notice on Friday, November 14, 1975, more than two weeks after check's deposit was made, court held (1) that trial court had erred in ruling that for purposes of UCC § 4-302(a), dealing with payor bank's liability for late return of demand item, arrival of check at First Security Bank's data processing center constituted "presentment on" and "receipt by" defendant Hailey branch of such check, so as to cause Hailey branch's midnight deadline to begin to run from time of check's arrival at data processing center, (2) that although data processing center performed some routine accounting steps for both Boise and Hailey branches, this did not destroy the essential character of the transaction, namely, that Boise branch had acted as collecting and presenting bank for item that only Hailey branch could pay, (3) that under UCC § 4-106, separate status of a branch bank is to be respected in computing its midnight deadline, even though some of the branch's duties are performed outside the branch, (4) that nothing in the record showed that the data processing center had had any authority to receive presentment of check in suit or any means of ascertaining check's genuineness and sufficiency of drawer's funds to pay it, (5) that check's presentment on payor bank therefore occurred when check physically arrived at defendant Hailey branch with indorsements of all prior transferors, including that of the Boise branch, and not when it arrived at data processing center in the Boise branch, and (6) that as a result, defendant Hailey branch's midnight deadline had to be calculated from time check was physically presented to and received by it (remanding case for further proceedings, including ruling as to whether defendant Hailey branch had settled for check within time prescribed by UCC § 4-302(a)). Idah-Best, Inc. v. First Sec. Bank, 99 Idaho 517, 584 P.2d 1242 (1978).

Where items accompanying drafts signed by maker were expressly delivered to payor bank against payment, items were "documentary drafts" and as such were exempt from midnight deadline of UCC § 4-302. Wiley v. Peoples Bank & Trust Co., 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

"Midnight deadline" prescribed by this section is defined within Code § 4-104(h) as midnight on next banking day following banking day on which item was received. Farmers Coop. Livestock Mkt. v. Second Nat'l Bank of London, 427 S.W.2d 247 (Ky. 1968).

4. Liability for late return.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) $________," and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee—and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)—because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC

§ 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words "payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. Horney v. Covington County Bank, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Where defendant payor bank (1) received two checks on July 15, 1974, made provisional settlement therefor, subsequently discovered that drawer's account lacked sufficient funds to cover either check, and returned both checks by mail on July 16, 1974, prior to its midnight deadline, but (2) failed to give "wire advice of nonpayment" before its midnight deadline, as required by Federal Reserve operating circular, court held (1) that payor bank was not liable to plaintiff depositary-collecting bank for face amount of such checks because payor bank, which concededly had not finally paid such checks under UCC § 4-213(1)(a)-(c), also did not finally pay them under UCC § 4-213(1)(d), since it had properly returned both checks before its midnight deadline, (2) that plaintiff's theory of liability could not be sustained because UCC §§ 4-301 and 4-302 impose liability for face amount of check only on payor banks on making final payment, but Federal Reserve operating circular in issue applied to both "paying banks and collecting banks," (3) that Federal Reserve regulation under which such circular had been issued did not, as implied by plaintiff's theory, vary either return provisions of UCC § 4-301 or accountability provisions of UCC § 4-302, (4) that since payor bank had returned both checks before its midnight deadline and thus had not finally paid them, UCC § 4-302, dealing with accountability for late return of checks, was not applicable to case, (5) that proper measure of damages in case was that imposed by UCC § 4-103(5), which provides that measure of damages for failure to exercise ordinary care in handling item is amount of item, reduced by amount that could not have been realized by use of ordinary care, and (6) that under UCC § 4-103(5), since plaintiff could not have recovered greater amount even if payor bank had complied with Federal Reserve wire-advice requirement, plaintiff had not been damaged. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (applying Michigan UCC).

Where (1) absconding horse trainer, after establishing checking account with defendant bank, obtained arrangement with defendant under which he was allowed to cover his checks as presented on a daily basis and thereafter covered with cash deposits all of his overdrafts up to December 20, 1973, (2) plaintiff racetrack cashed 29 checks drawn by trainer prior to to his absconding and presented such checks for payment to defendant between December 20, 1973 and January 3, 1974, (3) defendant became uneasy on January 2, 1974 about trainer's failure to cover checks on daily basis and returned all 29 checks, each inscribed "Refer to maker," to federal reserve bank on January 4, 1974, and (4) 20 of such checks had been presented prior to January 3, 1974, while nine were presented on January 3, 1974, defendant was liable under UCC § 4-301(1)(a) and § 4-302(a) to plaintiff racetrack for balance due on the 20 checks that had been presented to defendant before January 3, 1974 because of defendant's failure to return such items by its midnight deadline. However, defendant was not liable under any legal theory, regardless of its deviation from good banking practices in handling trainer's account, for the nine checks that had been returned before expiration of defendant's midnight deadline, since defendant's duty to payees or holders of such checks was limited to compliance only with Uniform Commercial Code requirements pertaining to dishonor and return of bad checks. Pennsylvania Nat'l Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196, 385 A.2d 932 (App. Div. 1978), certification denied, 77 N.J. 506, 391 A.2d 520 (1978).

Payor bank which failed to dishonor and return check before its midnight deadline was liable for amount of check under UCC § 4-301(1)(b) and UCC § 4-302(a). Manufacturers & Traders Trust Co. v. County Trust Region of Bank of N.Y., 59 A.D.2d 645 (4th Dep't 1977).

Where (1) bank customer tendered check to teller for deposit, (2) teller, instead of accepting check, told customer to take it to desk of bank vice president, (3) bank vice president accepted check and told another bank employee to put it in for collection and give customer receipt for it, and (4) employee complied with such order, bank in action for breach of its duty to act on check by bank's midnight deadline, could not successfully claim that teller had "returned" check to customer within meaning of UCC § 4-302(a), since teller did not "receive" check within meaning of UCC § 4-302, but simply postponed its receipt until customer took check to bank's vice president who accepted it for collection. Available Iron & Metal Co. v. First Nat'l Bank, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Payor bank became accountable for amount of item when it retained it beyond midnight of June 23, 1973, where item was received June 22, 1973, and not returned till June 28, 1973, despite fact that bank had received stop payment order from item's maker on May 15, 1973, and where bank admitted that item in question was "a demand item other than a documentary draft," thus bringing it squarely within provisions of UCC § 4-302. Templeton v. First Nat'l Bank, 47 Ill. App. 3d 443, 362 N.E.2d 33 (5th Dist. 1977).

Collecting bank was entitled to recover amount of deficiency from drawee bank where drawee bank paid encoded amount of under-encoded check, notwithstanding drawer's instruction to drawee bank after cancelled check had been returned to drawer and after drawer was informed of encoding error that drawee was not to "bother" his account; since posting check constituted final payment within meaning of UCC § 4-213(1) and since drawee bank retained check under UCC § 4-302 past its midnight deadline without completely settling for it, drawee bank was liable for face amount of check and drawer lost right to stop payment thereon. Georgia R.R. Bank & Trust Co. v. First Nat'l Bank & Trust Co., 139 Ga. App. 683, 229 S.E.2d 482 (1976), aff'd, 238 Ga. 693, 235 S.E.2d 1 (1977).

Under UCC § 4-105 where bank always paid drafts by charging drawer's account, bank was a payor bank and not a collecting bank. Where bank chose not to return items before midnight deadline as required by UCC § 4-301 even though there were insufficient funds in drawer's account, effect of bank's decision not to return was to make provisional settlement final pursuant to UCC § 4-302; thus, payor bank was accountable to payee for face amount of checks as bank failed to give timely notice of dishonor and nonpayment. Berman v. United States Nat'l Bank, 197 Neb. 268, 249 N.W.2d 187, 84 A.L.R.3d 1052 (1976).

Where checks were sent directly by mail to payor bank, accompanied by instruction requesting immediate return if not paid, and payor bank held checks without paying, returning, or notifying collecting bank of dishonor until collecting bank sent tracer which was returned almost one week later by payor bank, payor bank was accountable for unpaid balance of checks under UCC § 4-302(a). Kane v. American Nat'l Bank & Trust Co., 21 Ill. App. 3d 1046, 316 N.E.2d 177 (2d Dist. 1974).

There appearing no valid defense, payor bank became liable to plaintiff-holder for amount of two checks received by defendant by reason of its retention of said items beyond statutory deadline without having either settled for or paid them, or, in alternative, returned them or sent notice of dishonor, prior to deadline; court did not err in judgment denying payor bank's motion for summary judgment. National City Bank v. Motor Contract Co., 119 Ga. App. 208, 166 S.E.2d 742 (1969).

5. —Documentary drafts.

Bill of sale draft which was given in payment for cattle and which specifically provided that drawee-bank, at its option, could refuse to honor it unless bill of sale was properly filled out, was a "documentary draft" under UCC § 5-103, since instrument on its face specifically provided that condition of honor was bill of sale attached to draft as document of title to described cattle; therefore, drawee-bank was not liable for failure to pay or return item or send notice of dishonor prior to its midnight deadline since under UCC § 5-112 it could defer honor until close of third banking day following receipt of document at which time presenter of draft consented to bank holding draft for future payment. Marfa Nat'l Bank v. Powell, 512 S.W.2d 356, 15 UCCRS 463 (Tex. Civ. App. 1974), ref. n.r.e (Dec. 4, 1974).

6. —Proper notice of dishonor.

If a payor bank fails to take the action required by UCC § 4-301(1) within the time limits prescribed therein, it is accountable for the amount of the item under UCC § 4-302(a) if it retains the item beyond midnight of the banking day of receipt without settling for the item or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Oral notice of dishonor is not sufficient to establish compliance with UCC § 4-302(a). Only written notice of dishonor will suffice, since UCC § 4-302(a) requires that notice of dishonor must be "sent." Available Iron & Metal Co. v. First Nat'l Bank, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where, in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

Failure to give notice of dishonor within the statutory period imposed by UCC § 4-302 nails down the liability irrespective of whether or not the item would have been properly payable. Central Bank & Trust Co. v. First Northwest Bank, 332 F. Supp. 1166 (E.D. Mo. 1971), aff'd, 458 F.2d 511 (8th Cir. Mo. 1972) (applying Missouri law).

7. Effect of late return.

In action by payee of check against payor bank, where (1) payee on October 21, 1976 deposited check in its account with collecting bank, (2) collecting bank forwarded check to defendant, which received it on Friday, October 22, 1976 and returned it for insufficient funds on Monday, October 25, 1976, (3) defendant on November 4, 1976 instructed payee to redeposit check, (4) on such redeposit defendant, after receiving check, held it until November 16, 1976, and then returned it again for insufficient funds, (5) in intervening period, drawer of check had made assignment for benefit of creditors, and payee received no payment on instrument, (6) payee sued to recover amount of check under UCC § 4-302(a), dealing with late return of items, and alleged that defendant had prevented it from taking other means to protect itself, and (7) defendant claimed that when payee's bank forwarded once-dishonored check with covering letter that instructed defendant to remit its cashier's check when item was paid, defendant was thus directed to hold check as long as practicable without regard to defendant's midnight deadline, court held that agreement between two banks, based upon customs and practices of banking community, whereby payor bank, upon instruction of depositary bank, holds possible worthless check until sufficient funds are deposited to cover same, acts as reasonable suspension of midnight deadline, thus relieving payor bank of liability to payee under UCC § 4-

302(a). David Graubart, Inc. v. Bank Leumi Trust Co., 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller's account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 18, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts' dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller's account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payor bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid "through" second bank, instead of "by" it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or return drafts before bank's midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. Engine Parts, Inc. v. Citizens Bank, 92 N.M. 37, 582 P.2d 809 (1978).

Rule that payor bank is accountable for demand item retained beyond midnight deadline without settling it does not mean that there has been final settlement which would preclude depositary bank from charging amount of item back to its depositor upon subsequent dishonor of check. Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Where a payor bank does not return a check by the midnight deadline, payment of the check occurs by operation of UCC § 4-302. First Nat'l Bank v. National Bank, 491 P.2d 294 (Okla. 1971).

8. Defense; settlement.

Where agreement between Federal Reserve Bank and defendant bank achieved a method of provisional settlement which eliminated necessity of any formal action on part of defendant payor bank except to protest, prior to midnight deadline, in event items were not acceptable, such prior authorization was functional equivalent of provisional settlement; and having sent in approved form of notice of dishonor of insufficient fund checks prior to its midnight deadline, defendant bank was not liable to plaintiff payee under Missouri Code section pertaining to late return of items. Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F. Supp. 317 (E.D. Mo. 1973).

9. Excuse.

A payor bank is not liable to the payee for retaining a check previously returned for insufficient funds beyond its "midnight deadline" when it does so upon instruction of the depositary bank pursuant to an agreement concordant with a practice among banks for a payor to hold a previously dishonored item long enough to provide an opportunity for sufficient funds to be deposited by the drawer to meet the check, despite the fact that subdivision (a) of section 4-302 of the Uniform Commercial Code provides that if an item is presented on and received by a payor bank the bank is accountable for the amount of a demand item if the bank retains the item beyond midnight of the bank day of receipt without settling for it or does not pay or return the item or send notice of dishonor until after its midnight deadline, since the requirements of the Uniform Commercial Code can be modified by agreement to conform them with commercial usage, and since the payee's presentment of the check to its bank created a principal-agent relationship constituting an assent to the bank's dealing with the check in the manner customary in the banking industry; moreover, it was not unreasonable for the depositary bank to take a possibly worthless instrument and direct the payor bank to adopt a technique that might provide the only chance for collection. David Graubart, Inc. v. Bank Leumi Trust Co., 48 N.Y.2d 554, 399 N.E.2d 930 (1979).

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. Goodman v. Norman Bank of Commerce, 551 P.2d 661 (Okla. Ct. App. 1976).

10. Practice and procedure.

Subpoena duces tecum served on bank directing it to turn over to government certain checks that had been stolen in robbery would not be enforced where, under UCC § 4-301(1), bank was required to return check prior to its midnight deadline if it intended to dishonor check and where, under UCC § 4-302, bank could be held liable for face amount of check if it failed to act promptly and consistently with such requirements. United States v. Loskocinski, 403 F. Supp. 75 (E.D.N.Y. 1975) (applying New York law).

In prosecution for drawing check against insufficient funds with intent to defraud, bank was at liberty to disclose records of defendant's account, where, under UCC §§ 4-301 and 4-302, defendant's act of drawing check on account which had been closed for over one year subjected bank to potential liability for amount of check, and where, therefore, defendant had no overriding expectation of privacy with respect to bank records relating to status of his account. People v. Johnson, 53 Cal. App. 3d 394 (3d Dist. 1975).

Circumstance that defendant bank's remittance letter returning check and giving notice of dishonor, although dated January 27, was not stamped by Federal Reserve Bank until January 28, did not establish that bank failed to meet its statutory midnight deadline. Conn v. Bank of Clarendon Hills, 53 Ill. 2d 33, 289 N.E.2d 425 (1972).

Although a bank is liable to its customer for "wrongful dishonor" under the Uniform Commercial Code, it is forbidden under CPLR 5222 to honor withdrawals from an account specified in a restraining notice except pursuant to court order, and since a bank is thus restrained under a statute subsequent to the one creating a liability to its customer, any question of liability should yield to the consideration that the temporary dishonor of a customer's checks after service of a restraining notice cannot be said to be wrongful. Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co., 47 Misc. 2d 741 (1965), aff'd, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

11. —Damages, attorney's fees.

In action under UCC § 4-302 for payor bank's failure to meet its midnight deadline for accepting or dishonoring check presented to and received by it, on proof of failure to meet such deadline payor bank is liable for amount of check, regardless of whether check was properly payable to begin with or whether any actual damages were shown. Goodman v. Norman Bank of Commerce, 565 P.2d 372 (Okla. 1977).

Action based on payor bank's liability under UCC § 4-302 for failure to meet its midnight deadline for accepting or dishonoring check is action based on bank's mishandling of check and not suit on instrument itself. Thus, where bank prevailed in action brought under UCC § 4-302 for bank's alleged failure to meet midnight deadline for acting on check, bank could not recover attorney's fee under non-UCC statute providing that in any action to recover on negotiable instrument, prevailing party should be allowed reasonable attorney's fee. Goodman v. Norman Bank of Commerce, 565 P.2d 372 (Okla. 1977).

Payor bank which held after their presentment for payment seven documentary sight drafts for periods varying from two to eighteen days without paying drafts or returning them to collecting bank, in intentional violation of collecting bank's instructions not to hold drafts after maturity or for convenience of payor bank's customer, was liable for face amount of drafts under (1) theory of conversion of drafts under UCC § 3-419(1) or (2) theory that payor bank had violated UCC § 4-302(b) by not paying drafts, which were properly payable, or seasonably returning them after expiration of payor bank's midnight deadline. New Ulm State Bank v. Brown, 558 S.W.2d 20 (Tex. Civ. App. 1977) (holding that since Uniform Commercial Code provided measure of recovery for both conversion of drafts and their late return, no basis existed for imposing consequential damages for payor bank's bad faith in making late return of drafts).

When payor bank fails to return check by bank's midnight deadline, it is liable for face amount of check under UCC § 4-302, and its liability is not governed by UCC § 4-103(5), which provides that general measure of damages for failure to exercise ordinary care in handling an item is the amount of the item, less any amount which could not have been realized even by the exercise of ordinary care. Blake v. Woodford Bank & Trust Co., 555 S.W.2d 589 (Ky. Ct. App. 1977) (stating that there is a rational basis for imposing liability on payor banks that differs from the liability imposed on collecting banks, that payor bank is only bank in the collection process that is in a position to know the actual state of the drawer's account, and that it is also the only bank in the collection process that can actually pay the check).

Where checks were dishonored but were not returned within time limits prescribed by UCC § 4-302, payor bank was liable to payees for face amount of checks less any payments received with respect thereto, notwithstanding payor bank's claim that due to short period of time between dishonor and drawer's bankruptcy, payees would have been unable, assuming timely return, to have obtained judgment against drawer, or even assuming payment, payees would not have been able to retain monies received since payment would represent voidable preference as against drawer's other creditors. Furthermore, payor bank failed to establish any right of subrogation under UCC § 4-407 and, thus, was not entitled to assert against payees any claims which might exist in favor of drawer of checks. Met Frozen Food Corp. v. National Bank of N. Am., 89 Misc. 2d 1033 (1977).

Payor bank which did not pay or return check and did not send notice of dishonor until after midnight deadline was liable to payee for full amount of check; however, bank was apparently entitled to subrogation under UCC § 4-407. AH-RS Coal Corp. v. Farmers Nat'l Bank, 63 Pa. D. & C.2d 203 (1973).

In suit by holder of drafts against drawee bank seeking to recover on drafts based on bank's delay in returning drafts until after midnight deadline following second presentment, UCC § 4-302 was held to create a liability independent of negligence or conversion for the amount of the item involved. Bank of Am. Nat'l Trust & Sav. Ass'n v. Security Pac. Nat'l Bank, 23 Cal. App. 3d 638 (5th Dist. 1972).

This section in holding a payor bank "accountable for the amount" of a demand item, such as a check, where the bank retains the item beyond midnight on the banking day following the day it received the item, imposes liability for the full amount of the item. Where the defendant bank as payor bank, had upon presentment for payment dishonored a check payable to the plaintiff for insufficient funds on two prior occasions within the midnight deadline period, it is held that the failure of the defendant bank to return such check within the deadline period upon the third presentment of such check through a collection bank was excused. Leaderbrand v. Central State Bank, 202 Kan. 450, 450 P.2d 1 (1969).

"Accountability" for amount of item within Code § 4-302(a) imposes liability for full face amount of item even without proof of damages. Farmers Coop. Livestock Mkt. v. Second Nat'l Bank of London, 427 S.W.2d 247 (Ky. 1968).

A bank's measure of damages for late return of an item presented to it for payment is the amount of the item. Rock Island Auction Sales, Inc. v. Empire Packing Co., 32 Ill. 2d 269, 204 N.E.2d 721, 18 A.L.R.3d 1368 (1965).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 762, 770-772.

11 Am. Jur. 2d, Banks and Financial Institutions § 980.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:221-4:225 (Collection of items; payor banks; late return).

CJS. 9 C.J.S., Banks and Banking §§ 364-366, 404.

§ 75-4-303. When items subject to notice, stop-payment order, legal process, or setoff; order in which items may be charged or certified.

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank, comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

(1) The bank accepts or certifies the item;

(2) The bank pays the item in cash;

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement;

(4) The bank becomes accountable for the amount of the item under Section 75-4-302 dealing with the payor bank's responsibility for late return of items; or

(5) With respect to checks, a cutoff hour no earlier than one (1) hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a), items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

SOURCES: Codes, 1942, § 41A:4-303; Laws, 1966, ch. 316, § 4-303; Laws, 1992, ch. 420, § 101, eff from and after January 1, 1993.

Cross References — What constitutes acceptance of commercial paper, see § 75-3-409.

Certification of check, see § 75-3-409.

Settlement with right to revoke, see § 75-4-215.

Deferred posting, see § 75-4-301.

Payor bank's responsibility for late return of items, see § 75-4-302.

JUDICIAL DECISIONS

1. In general; issuance, acceptance of cashier checks.
2. —Bank money orders.
3. —Electronic funds transfer.
4. Payment in cash.
5. Completion of posting process.
6. Effect of court orders.
7. Order of payment.
8. Practice and procedure.

1. In general; issuance, acceptance of cashier checks.

A bank is not deprived of its right of set-off against a general business account by its knowledge that there are innocent third parties that are going to be injured. Deposit Guar. Nat'l Bank v. B.N. Simrall & Son, 524 So. 2d 295 (Miss. 1987).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

A stop-payment order is one which countermands a previously valid order to draw money from a depositor's account. Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Where collecting bank accepted for collection check drawn on drawee bank for $25,000 but misencoded such check as $2,500 item; where drawee bank, relying on encoded figure of $2,500, processed check electronically and paid it as $2,500 item; and where drawer of check refused to allow drawee bank to debit drawer's account for remaining $22,500, as between drawee bank and collecting bank, drawee bank was liable under UCC § 4-303 and § 4-403 for undebited sum of $22,500, since after check was acted on by drawee bank, drawer no longer had authority to stop payment thereon. First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co., 238 Ga. 693, 235 S.E.2d 1 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976).

Under UCC § 4-303 stop payment order given by purchaser and received by bank after it had issued cashier's check came too late to terminate or suspend bank's obligation to honor and pay it; purchaser's only remedy was action against payee. State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976).

Plaintiff bank was not entitled to recover $3,025 which defendant received as proceeds of cashier's check issued to defendant by bank where defendant used personal check of one of bank's customers in same amount as cashier's check as payment for cashier's check and where bank's customer subsequently stopped payment on his check; when bank accepted its customer's check as payment for cashier's check, customer's check was paid in cash without any reservation of right to revoke settlement under UCC § 4-213(1)(a) and (b); thus, bank erred to its own prejudice when it did not inform its customer that his stop payment order came too late under UCC § 4-303(1)(b), and in honoring stop payment order when it was received too late. Citizens & S. Nat'l Bank v. Youngblood, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

A stop order, whether or not effective under other rules of law to terminate or suspend a bank's right or duty to pay an item, comes too late to terminate or suspend such right or duty if it is received after the bank has accepted or certified the item. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of consideration or fraud. TPO, Inc. v. FDIC, 487 F.2d 131 (3d Cir. N.J. 1973) (applying New Jersey law).

Cashier's check was accepted when issued and it was beyond power of bank to stop payment on it since, under UCC § 4-303, stop payment order comes too late if order is received after bank has accepted item. Kaufman v. Chase Manhattan Bank, Nat'l Ass'n, 370 F. Supp. 276 (S.D.N.Y. 1973).

Payment may not be stopped once a cashier's check has been issued. National Newark & Essex Bank v. Giordano, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

2. —Bank money orders.

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. Thompson Poultry, Inc. v. First Nat'l Bank, 199 Neb. 8, 255 N.W.2d 856 (1977).

3. —Electronic funds transfer.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047 (2d Cir. N.Y. 1979).

4. Payment in cash.

Under UCC § 4-303 stop payment order came too late to modify bank's right or duty to pay check after bank had already paid item in cash. Siniscalchi v. Valley Bank, 79 Misc. 2d 64 (1974).

Where bank negligently paid check over drawer's stop payment order it was not entitled to recover payment from payee of check. Anthony Roberts Properties, Inc. v. Industrial Val. Bank & Trust Co., 97 Montg. County L. Rep. 165 (Pa. 1973).

5. Completion of posting process.

Where checks received for payment from a depositor's account were not machine posted but were withdrawn, examined by a bank officer who indicated there were sufficient funds in the account to pay them, and the items were thereafter hand stamped and initialed but were not machine posted until a day subsequent to the receipt by the bank of trustee process which would have precluded their payment, the bank had prior to receipt of the process clearly manifested its decision to pay the items and it was clear that the trustee writ was served after such decision had been made and the writ was therefore served too late to terminate or suspend the bank's right and duty to charge the checks against the depositor's account. Yandell v. White City Amusement Park, 232 F. Supp. 582 (D. Mass. 1964).

6. Effect of court orders.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Payment on cashier's check issued by bank in favor of depositor and endorsed and delivered by him to third party could not be stopped in absence of court order or indemnification bond. Dziurak v. Chase Manhattan Bank, 58 A.D.2d 103 (2d Dep't 1977), appeal dismissed, 43 N.Y.2d 695, 401 N.Y.S.2d 66, 371 N.E.2d 828 (1977), aff'd, 44 N.Y.2d 776, 406 N.Y.S.2d 30, 377 N.E.2d 474 (1978).

In suit by plaintiff customer against bank to recover amount of check allegedly paid by bank in defiance of plaintiff's stop-payment order, where check was initially presented to and paid by bank on January 9, 1975; where plaintiff later complained to bank that check had improper indorsement, and bank on June 24, 1975 notified plaintiff that its account had been recredited with amount of check and that bank had placed stop-payment order on check; where bank also sent plaintiff stop-payment order form which plaintiff duly executed and returned to bank on June 26, 1975; where plaintiff on December 5, 1975 wrote bank that stop-payment order was still in effect; and where bank on January 2, 1976, again received same check for payment, paid it despite fact that this time it had different indorsement (that of named payee), and redebited plaintiff's account with amount of check, trial court's judgment that stop-payment order was still in effect when bank paid check second time and that such payment was error would be affirmed because (1) nothing in record suggest any irregularity or misconstruction by bank with respect to such stop-payment order and its purpose; and (2) defendant's contention that check had been "finally paid" under UCC § 4-213(1)(b) and (c) and UCC § 4-303(1)(c) and (d) on January 9, 1975, and that such "final payment" had priority over plaintiff's subsequent stop-payment order, could not be sustained, since such stop-payment order related not to payment made on January 9, 1975, but to payment made on January 2, 1976. In such case, it was incongruous for bank to contend that it could rightfully pay check again because it had already "finally paid" it. Trust Co. v. Student Air Travel Agency, Inc., 142 Ga. App. 248, 235 S.E.2d 670 (1977).

In bankruptcy proceeding bank was not entitled to set off checking account of bankrupt customer against customer's demand note to bank where bank did no more than declare its intention to set off account prior to date of order by bankruptcy court prohibiting such set offs; mere intra-mural declarations between employees of bank, accompanied by no affirmative acts and no steps to record transaction, were insufficient to effectuate set off. Baker v. National City Bank, 75 Ohio Op. 2d 275, 511 F.2d 1016 (6th Cir. Ohio 1975) (applying Ohio law).

Determining from non-code law that the process of posting a check to a depositor's account had not been completed prior to receipt by the bank of a restraining order prohibiting it from paying money from the account, the court held that the bank's duty to pay the check's payee was terminated by its receipt of the order. Gibbs v. Gerberich, 1 Ohio App. 2d 93, 203 N.E.2d 851, 17 A.L.R.3d 928 (1964).

7. Order of payment.

Final payment of an item under UCC § 4-213(1) is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop-orders, legal process, and setoffs (see UCC § 4-303). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Colorado Nat'l Bank v. First Nat'l Bank & Trust Co., 459 F. Supp. 1366 (W.D. Mich. 1978) (construing Michigan UCC).

Final payment of an item is important for a number of reasons. It is one of several factors that determine the relative priorities between items and notices, stop orders, legal process, and setoffs (UCC § 4-303(1)). It is the "end of the line" in the collection process and the "turn-around" point that commences the return flow of proceeds. It is the point at which many provisional settlements become final (see UCC § 4-213(2)). Final payment of an item by the payor bank also fixes preferential rights under UCC § 4-214(1) and (2). Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Where (1) buyer on November 16, 1976 paid for hog feed by check drawn on buyer's account with defendant first bank when such account contained sufficient funds, (2) before check was presented to first bank for payment, state bank examiner closed have and froze all of its accounts, (3) defendant second bank later assumed first bank's accounts, including buyer's account, and dishonored buyer's check when feed seller presented it for payment, (4) seller then sued buyer on check, and buyer defended suit on ground that both banks had wrongfully dishonored check, (5) seller obtained summary judgment on check on May 5, 1977 and attempted to levy execution against buyer's checking account on July 8, 1977, (6) second bank, instead of surrendering funds in such account to sheriff, deposited such funds into court on July 11, 1977, and (7) buyer, on same day (May 5, 1977) that seller recovered summary judgment against him, assigned checking account to buyer's attorney for fees owed in prior litigation, court held (1) that trial court properly ruled that buyer's check to seller had priority to payment from funds in buyer's checking account as against buyer's assignment, nearly six months later, of such account to his attorney, (2) that second bank, by properly paying funds in checking account into court, rather than honoring check to seller drawn on such account or assignment of account to buyer's attorney, failed to establish any priority as between check and assignment, although bank under UCC § 4-303(2) could have paid either item if it had chosen to do so, (3) that under UCC § 1-103, common law governing assignments was still in effect, (4) that under UCC § 4-303(1), second bank, if it had so chosen, could have paid check to seller because it had been drawn prior to bank's receipt of notice that checking account had been assigned, even though check was actually received after such notice, (5) that fact that check had not been paid before second bank received notice of such assignment did not require that assignment should prevail over check, since second bank at no time received any stop-payment order on check, (6) that both check and assignment of buyer's checking account thus came before trial court on an equal footing, and (7) that trial court properly gave priority to check because it was first item issued, on the principle that as between rights otherwise equal, the earliest is preferred. Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly, 268 N.W.2d 762 (N.D. 1978).

Where bank had first lien on funds of drawer in special escrow accounts and right of setoff, holder of post-dated checks could not enforce priority payment out of escrow accounts. Steinbrecher v. Fairfield County Trust Co., 5 Conn. Cir. Ct. 393, 255 A.2d 138 (1968).

8. Practice and procedure.

Where (1) IRS claimed priority over proceeds of bank customer's checking account by virtue of notice of levy served on bank at 12:30 p.m., May 20, 1975, to recover delinquent taxes assessed against customer, (2) bank at 11:00 a.m. on same day had in its possession two checks drawn on it by such customer to pay balance and interest due on bank's loan to customer, and (3) bank claimed that prior to service of IRS notice of levy, it had taken action within meaning of UCC § 4-303(1)(d) that evidenced its decision to pay checks, thereby preempting the IRS tax lien, bank's claim was not sustained by evidence which showed (1) that customer had delivered its second check for interest on loan to teller in bank's loan department at about 11:00 a.m., (2) that teller was then busy and put such check aside, together with customer's other check and note that evidenced the loan, (3) that teller did not know whether sufficient funds were in customer's account to pay such checks, (4) that bank officer who knew that account had sufficient funds did not inform teller of such fact, (5) that such bank officer did not know that customer's second check had been delivered to teller, and (6) that no bank official with full knowledge of the facts actually made any decision to pay the two checks. In such case, bank's evidence showed only certain acts preliminary to a true decision to pay checks and was insufficient under UCC § 4-303(1)(d). Citizens & Peoples

Nat'l Bank v. United States, 570 F.2d 1279 (5th Cir. Fla. 1978) (applying Florida law).

In action under UCC § 5-114(2)(b) by corporation procuring issuance of letter of credit to restrain issuing bank from making payment to letter's beneficiary because of beneficiary's alleged fraud, injunction could not be issued under UCC § 4-303(1)(d) where before temporary restraining order was served on issuing bank, it had determined that beneficiary had complied with terms of letter, had honored letter by mailing check to beneficiary, and had completed process of posting such check to plaintiff's account. Tranarg, C.A. v. Banca Commerciale Italiana, 90 Misc. 2d 829 (1977).

RESEARCH REFERENCES

ALR. Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order. 97 A.L.R.3d 714.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions §§ 847-854.

11 Am. Jur. 2d, Banks and Financial Institutions § 945.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:241-4:244 (Collection of items; payor banks; items subject to notice or stop-payment order).

CJS. 9 C.J.S., Banks and Banking §§ 332, 333, 340-343, 355, 360, 364-366, 374, 378, 378, 379, 416, 434, 440 et seq., 470, 471/

PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

Sec.

75-4-401. When bank may charge customer's account.
75-4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.
75-4-403. Customer's right to stop payment; burden of proof of loss.
75-4-404. Bank not obligated to pay check more than six (6) months old.
75-4-405. Death or incompetence of customer.
75-4-406. Customer's duty to discover and report unauthorized signature or alteration.
75-4-407. Payor bank's right to subrogation on improper payment.

§ 75-4-401. When bank may charge customer's account.

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in Section 75-4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Section 75-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under Section 75-4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) The original terms of the altered item; or

(2) The terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

SOURCES: Codes, 1942, § 41A:4-401; Laws, 1966, ch. 316, § 4-401; Laws, 1992, ch. 420, § 102, eff from and after January 1, 1993.

Cross References — Incomplete instruments, see § 75-3-115.
Alteration of instruments, when material and effect, see § 75-3-407.

JUDICIAL DECISIONS

1. In general.
2. "Properly payable" item.
3. —Conversion.
4. Cosignatory's liability.
5. Creation of overdraft.
6. Bank's good faith; due care.
7. Notice knowledge.
8. Drawer's liability; improper completion.
9. Practice and procedure.

1. In general.

Although Uniform Commercial Code governs relationship between payor bank and its customers, particularly UCC §§ 4-401 to 4-407, it has not displaced general rule that, without authority from maker or other acceptable justification, check, drawn to order of bank precludes diversion proceeds of such check to use other than that of drawer. Transamerica Ins. Co. v. United States Nat'l Bank, 276 Or. 945, 558 P.2d 328 (1976).

2. "Properly payable" item.

Where (1) money given to plaintiff wife in trust for her children was deposited in savings bank trust accounts at defendant savings bank, (2) plaintiff's husband forged plaintiff's signature on both bank signature cards and also on four withdrawal orders against such trust accounts, (3) defendant savings bank honored withdrawal orders by issuing as payment thereon four checks made payable to plaintiff which were drawn on defendant's own account at another bank, (4) plaintiff's husband forged plaintiff's indorsement on such checks and deposited them in his business account at still another bank, and (5) husband's bank then forwarded such checks to defendant's bank which accepted and paid them, in conversion action against defendant bank, plaintiff established prima facie case since defendant could not under UCC § 4-401 debit plaintiff's account for withdrawals made by plaintiff's husband without plaintiff's authorization and under UCC § 3-419(1)(c), instruments were converted when they were paid on forged indorsements. Payment of the four withdrawal orders bearing plaintiff's forged signature was made by defendant when defendant's own bank accepted the four checks drawn by defendant and paid out on them on defendant's account, and fact that defendant did not pay cash over the counter on such withdrawal orders, but ordered its own bank to make payment thereon, did not alter legal effect of transaction. Ahrens v. Westchester Fed. Sav. & Loan Ass'n, 58 A.D.2d 799 (2d Dep't 1977).

Check that was presented to drawer's bank was "otherwise properly payable" under UCC § 4-401(1), notwithstanding payee failed to endorse check and collecting bank failed to supply missing endorsement, where check was made payable to order of named payee and was delivered to payee. First Nat'l Bank v. Barrett, 141 Ga. App. 161, 233 S.E.2d 24 (1977).

3. —Conversion.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of Price v. Neal (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank. United States v. Pavloski, 574 F.2d 933 (7th Cir. Wis. 1978) (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based).

4. Cosignatory's liability.

Cosignatory on joint checking account was not liable for overdraft beyond balance of joint account where cosignatory neither participated in transaction creating overdraft nor received funds as result of it. Cambridge Trust Co. v. Carney, 115 N.H. 94, 333 A.2d 442 (1975).

The Code does not alter the prior rule that in the case of a joint account one cosignatory cannot be held beyond the balance in the account and that a joint deposit does not make each cosignatory the agent of the other with respect to the making of overdrafts. National Bank v. Derhammer, 16 Pa. D. & C.2d 286 (1959).

5. Creation of overdraft.

Where (1) check, drawn on December 3, 1973 on account with insufficient funds by drawer of apparently unstable mind, was dishonored before drawer's death by branch office of defendant bank, (2) payee re-presented check at defendant's main office, and teller who cashed it violated defendant's rule about cashing checks for more than $500 without obtaining manager's approval, (3) drawer's attorney requested defendant to place "hold" order on drawer's account, and two such orders were entered on December 5 and 6, 1973, and (4) on drawer's death, defendant set off amount of check against certificate of deposit held by drawer with defendant, and defendant's estate sought to recover such sum, court held (1) that since check was properly payable on its face and otherwise, defendant under UCC § 4-401(1) had right to charge it against drawer's account, even though such charge created overdraft, (2) teller's violation of rule about cashing checks could not be invoked for benefit of estate, since it was internal bank rule only, (3) prior dishonor of check did not affect defendant's right to pay it on later presentment, and (4) under UCC § 4-405(1), "hold" orders of drawer's attorney on drawer's account were not effective, since drawer had not been adjudicated to be an incompetent. Lincoln Nat'l Bank & Trust Co. v. Peoples Trust Bank, 177 Ind. App. 312, 379 N.E.2d 527 (1978).

Right of bank under UCC § 4-401(1) to charge worthless check against customer's account, even though such charge created overdraft, did not excuse bad-check violation of defendant in criminal case, since bank's authority to take such action is conferred by a purely civil statute and, in any event, is discretionary. Warren v. Commonwealth, 219 Va. 416, 247 S.E.2d 692 (1978).

In action by payor bank against collecting bank to recover payment of checks made out to fictitious payees, collecting bank, which had guaranteed all prior indorsements on checks, could not successfully assert as defense that payor bank had been negligent in making payment against nonexistent funds, since UCC § 4-401 expressly permits payor bank to charge customer's account, even though such charge creates overdraft. Bank Leumi Trust Co. v. Marine Midland Bank, 90 Misc. 2d 337 (1977), rev'd on other grounds, 93 Misc. 2d 41, 402 N.Y.S.2d 111 (1977).

It is perfectly legal for bank to charge item against customer's account even though charge creates an overdraft; result is merely extension of credit to customer. State v. Mullin, 225 N.W.2d 305, 75 A.L.R.3d 1072 (Iowa 1975).

When presented with an overdraft otherwise properly payable, drawee bank may pay overdraft and collect amount paid from drawer, since draft itself constitutes authorization to pay and to charge drawer with amount thereof. City Bank v. Tenn, 52 Haw. 51, 469 P.2d 816 (1970).

6. Bank's good faith; due care.

Although customer's sister who appeared at bank before bank knew of customer's death and who stated that customer had decided to close out his account did not have authority to make withdrawal, bank which checked authenticity of customer's signature on check and identification of sister acted in good faith was not liable to customer's estate under UCC § 4-401(2). Russello v. Highland Nat'l Bank, 56 A.D.2d 772 (1st Dep't 1977).

Drawee bank had obligation to drawer, its customer, to exercise due care and it had authority to charge drawer's account only for checks it cashed "in good faith" under UCC § 4-401; thus, if drawee bank cashed checks, forged by drawer's employee, as result of its own negligence and not in good faith, it was liable to drawer notwithstanding effectiveness of endorsements. Board of Higher Educ. v. Bankers Trust Co., 86 Misc. 2d 560 (1976).

Where undated checks were issued in 1955 and were completed in 1964 with the then current date, the bank formed by the merger of the original drawee and another bank was protected where it in good faith honored such checks. Newman v. Manufacturers Nat'l Bank, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

The drawee is entitled to accept the date of the check as true where there is nothing to indicate the contrary since the date on an instrument is "presumed to be correct." Newman v. Manufacturers Nat'l Bank, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

7. Notice knowledge.

Where a bank had knowledge of the limited authority of a fiduciary, such bank may be held liable for checks paid in excess of that authority and also without the surety's co-signature. Barad v. Bank of Commerce, 31 A.D.2d 809 (2d Dep't 1969).

8. Drawer's liability; improper completion.

Where an attorney forged his client's signature on a multi-party check made out to attorney and client in settlement of a negligence action, the drawer, by negligently failing to notify the payor bank of the forgery, was liable to client for payment of the check proceeds to the attorney. Dobbins v. National Union Ins. Co., 70 Misc. 2d 1087 (1972).

9. Practice and procedure.

Under UCC § 4-401, bank was lawfully entitled to pay overdraft and to seek recourse from its customer, notwithstanding evidence that under bank's usual internal procedures and policies, bank would have known check represented overdraft and would not have paid it, where customer's conversations with bank employees concerning overdraft policies did not constitute contractual arrangement that check would be dishonored and where there was no claim that bank was estopped as result of conversation relating to overdraft. Continental Bank v. Fitting, 114 Ariz. 98, 559 P.2d 218 (Ct. App. 1977).

A depositor's allegation that the defendant bank, with knowledge that two other customers were engaged in check kiting, manipulated the three accounts so as to appropriate to itself money lost by plaintiff who had drawn checks in large amounts to one of the kiting customers was sufficient to state a good cause of action, since whatever might be the bank's right to recover its losses from one customer at the expense of another, it must do so in good faith. J.F. Braun & Sons v. First Nat'l City Bank, 32 A.D.2d 749 (1st Dep't 1969).

RESEARCH REFERENCES

ALR. Effect of bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Bank's liability for payment or withdrawal on less than required number of signatures. 7 A.L.R.4th 655.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 768.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 896 et seq., 927, 928.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:251-4:259 (Relationship between payor bank and customer; right to charge customer's account).

4 Am. Jur. Pl & Pr Forms (Rev), Banks, Forms 61 et seq. (withdrawals and payments).

CJS. 9 C.J.S., Banks and Banking §§ 429, 430, 416.

§ 75-4-402. Bank's liability to customer for wrongful dishonor; time of determining insufficiency of account.

(a) Except as otherwise provided in this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

SOURCES: Codes, 1942, § 41A:4-402; Laws, 1966, ch. 316, § 4-402; Laws, 1992, ch. 420, § 103, eff from and after January 1, 1993.

Cross References — Measure of damages for failure to exercise ordinary care in handling item, see § 75-4-103.

JUDICIAL DECISIONS

1. In general.
2. Relationship to other laws.
3. Customer.
4. Damages.
5. Wrongful dishonor.
6. Mistake.
7. Practice and procedure.

1. In general.

UCC § 4-402 obligates a bank, unless it has a lawful excuse to dishonor, to honor drafts drawn on its customer's account if the account has sufficient funds. However, UCC § 4-402 does not apply to the dishonor of a draft presented by one who is not a customer of the bank. Riverside Nat'l Bank v. Lewis, 572 S.W.2d 553 (Tex. Civ. App. 1978), remanded, 603 S.W.2d 169 (Tex. 1980), on remand, 605 S.W.2d 954 (Tex. Civ. App. Houston 1st Dist. 1980).

Bank's liability for damages proximately caused by wrongful dishonor of item (1) is governed by UCC § 4-402, (2) is limited to actual damages proved when dishonor occurs through bank's mistake, and (3) if so proximately caused and proved, recovery may include consequential damages, as for loss of credit and mental anguish. First Nat'l Bank v. Hubbs, 566 S.W.2d 375 (Tex. Civ. App. 1978).

The liability of a bank for wrongful dishonor of a customer's item is enunciated in UCC § 4-402, under which consequential damages which are proved can be recovered. Luxonomy Cars, Inc. v. Citibank, 65 A.D.2d 549 (2d Dep't 1978).

Under UCC § 4-402, bank is obligated to honor drafts drawn on customer's account if account has sufficient funds, absent any lawful excuse for dishonor. Baytown State Bank v. Don McMillian Leasing Co., 551 S.W.2d 771 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

A bank which wrongfully dishonors the checks of a partnership is liable in damages to the partnership and not to the partners individually. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

2. Relationship to other laws.

A New York statute forbidding a bank from honoring withdrawals from an account specified in a restraining notice, except pursuant to court order, relieves the bank from liability under this section for refusal to honor its depositor's checks after service of such a notice. Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co., 47 Misc. 2d 741 (1965), aff'd, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

3. Customer.

Under UCC § 4-104(1)(e), president of corporation was not "customer" of bank with respect to corporation's checking account, notwithstanding he opened corporate account, determined who would draw on it and also had personal account with bank, and thus he did not have cause of action against bank under UCC § 4-402 for wrongful dishonor of checks drawn on corporate account. Farmers Bank v. Sinwellan Corp., 367 A.2d 180 (Del. 1976).

Incorporators of corporation were "customers" of bank within contemplation of UCC § 4-402 where bank and bank officer looked directly to incorporators to satisfy obligations of corporation by requiring incorporators to execute personal guaranties of loans to corporation and to cover credit bank extended to corporation in form of honoring its overdrafts, where corporation had never issued shares and was under-capitalized and incorporators alone controlled its financial affairs and personally vouched for its fiscal responsibility, where bank, and suppliers and employees of corporation, knew this was situation, and where it was entirely foreseeable that dishonoring of corporation checks would reflect directly on personal credit and reputation of incorporators and that they would suffer adverse personal consequences if bank reneged on its commitments. Thus, in action against bank for wrongful dishonor of corporation's checks, individual incorporators were entitled to recover damages for intentional infliction of emotional distress, even though bank's conduct involved breach of contract, but were not entitled to recover punitive damages in absence of proof of "evil motive" on part of bank. Kendall Yacht Corp. v. United Cal. Bank, 50 Cal. App. 3d 949 (4th Dist. 1975).

4. Damages.

Award of damages under UCC § 4-402 to customer of bank for bank's wrongful dishonor of customer's check was not justified where customer failed to prove that any loss had proximately resulted from bank's action. Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231 (La. App. 1978) (noting that evidence did not show that bank's action had affected plaintiff's credit or commercial reputation).

Where bank dishonored customer's check by mistake, customer was not entitled to damages on presumption that mere fact of dishonor injuriously affected her business reputation; under UCC § 4-402 customer could recover only actual damages. Continental Bank v. Fitting, 114 Ariz. 98, 559 P.2d 218 (Ct. App. 1977).

Statutory reference to "damages proximately caused", "actual damages proved", and "consequential damages" authorized trial judge to award damages by determining annual loss of profits to plaintiff from termination of this relationship with his supplier and to project this loss for three-year period in suit for damages allegedly suffered by customer of bank resulting from bank's erroneously dishonoring customer's check given to supplier. Skov v. Chase Manhattan Bank, 407 F.2d 1318 (3d Cir. V.I. 1969).

In action for wrongful dishonor of checks, depositor could recover for harm to business and credit standing as established by unrebutted presumption that such harm results from wrongful dishonor, but there could be no recovery for loss of business income and mental anxiety and suffering in absence of sufficient evidence that these were proximately caused by wrongful dishonor. American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 252 N.E.2d 839 (1969).

5. Wrongful dishonor.

Where bank, which was both payor bank and depositary bank as to two checks representing estate funds which were deposited by payee in payee's checking account with bank, had only reserved under payee's deposit contract right to charge back any item before final payment, and where bank did not attempt to recover estate funds represented by such checks until nine days after bank had received checks, final payment of such checks had already occurred under UCC § 4-213(1)(d) before bank attempted to recover such funds. However, in payee's suit against bank under UCC § 4-402 for dishonoring checks written by payee against his account after the two checks representing estate funds in issue had been deposited in payee's account, court would reverse summary judgment for bank and remand cause for new trial on issue of bad faith of payee in participating in deposit of such funds in payee's account in violation of court decree in estate proceeding. Bartlett v. Bank of Carroll, 218 Va. 240, 237 S.E.2d 115 (1977) (observing that UCC Art 4 neither specifically contemplates nor excludes recovery by bank after final payment of item when person receiving the credit has acted in bad faith).

Bank was liable to its customer for wrongful dishonor of several checks under UCC § 4-402 and evidence supported award of $2,000 actual damages and $3,500 punitive damages where, inter alia: (1) bank charged back to customer's account $275 check which had been cashed in name of customer by forged endorsement, dishonored customer's checks because of charge back, and charged customer $15 for checks drawn on insufficient funds; (2) as result of dishonor, customer missed approximately one week of work and school, suffered humiliation and embarrassment as result of dishonored checks, and matter ultimately was turned over to collection agency; (3) and each step taken by bank was deliberate, intentional and done with knowledge of plaintiff's claim of right. Northshore Bank v. Palmer, 525 S.W.2d 718 (Tex. Civ. App. 1975), ref. n.r.e (Oct. 22, 1975).

Bank was not liable to its customer for wrongful dishonor of draft where, although bank had granted customer line of credit, customer had exceeded or "overdrawn" amount of such credit. Modoc

Meat & Cattle Co. v. First State Bank, 271 Or. 276, 532 P.2d 21 (1975).

6. Mistake.

Where bank applied funds in a partnership account to liquidate personal indebtedness of an individual partner thereby causing partnership's outstanding checks to be dishonored for insufficiency of funds, the question of whether the dishonor occurred merely as a consequence of the bank's mistake is one of fact to be determined by the jury. Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966).

7. Practice and procedure.

Evidence that depositor established "special account" in defendant bank, that checks drawn on such account required signatures of two of three persons, depositor, depositor's contractor or officer of bank, and that depositor issued check to his wife for balance of account, that she presented check to bank officer for his signature, but he refused to sign check stating that money in account did not belong to depositor, and that bank officer later admitted money in account belonged to depositor and bank had no interest in or claim against it, was sufficient to support recovery for wrongful dishonor notwithstanding fact that check issued to depositor's wife did not carry two signatures, since missing signature was that of bank officer and, by that officer's testimony, it was clear that bank had no interest in money on deposit. Wallick v. First State Bank, 532 S.W.2d 520 (Mo. Ct. App. 1976).

Although a bank is liable to its customer for "wrongful dishonor" under the Uniform Commercial Code, it is forbidden under CPLR 5222 to honor withdrawals from an account specified in a restraining notice except pursuant to court order, and since a bank is thus restrained under a statute subsequent to the one creating a liability to its customer, any question of liability should yield to the consideration that the temporary dishonor of a customer's checks after service of a restraining notice cannot be said to be wrongful. Sumitomo Shoji N.Y., Inc. v. Chemical Bank N.Y. Trust Co., 47 Misc. 2d 741 (1965), aff'd, 25 A.D.2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

RESEARCH REFERENCES

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Who may recover for wrongful dishonor of check under UCC § 4-402. 88 A.L.R.4th 613.

Damages recoverable for wrongful dishonor of check under UCC § 4-402. 88 A.L.R.4th 644.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 930-943.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:271-4:279 (Relationship between payor bank and customer; wrongful dishonor).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2311 et seq. (Liability of bank to customer for wrongful dishonor).

CJS. 9 C.J.S., Banks and Banking §§ 335, 348, 349, 375-377.

§ 75-4-403. Customer's right to stop payment; burden of proof of loss.

(a) A customer or any person authorized to draw on the account if there is more than one (1) person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in Section 75-4-303. If the signature of more than one (1) person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six (6) months, but it lapses after fourteen (14) calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a record given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under Section 75-4-402.

SOURCES: Codes, 1942, § 41A:4-403; Laws, 1966, ch. 316, § 4-403; Laws, 1992, ch. 420, § 104; Laws, 2010, ch. 506, § 33, eff from and after July 1, 2010.

Cross References — Drawer's liability to holder in due course, see §§ 75-3-302, 75-3-414.

Certification of check, see §§ 75-3-409, 75-4-303.

When payment or acceptance final, see § 75-3-418.

Discharge by payment or satisfaction to holder, see § 75-3-603.

Bank's responsibility for lack of good faith or failure to exercise ordinary care, see § 75-4-103.

Payment after notice of death, see § 75-4-405.

Payment of item over stop payment order, subrogation, see § 75-4-407.

JUDICIAL DECISIONS

1. In general.
2. Purpose.
3. Applicability to purchase money order.
4. Customer.
5. Stop payment order.
6. —Exculpatory clauses.
7. —Renewal.
8. —Effect.
9. Payment contrary to stop order.
10. Loss.
11. Rights of holder.
12. Pleadings.
13. Burden of proof.
14. Novation.
15. Setoff.
16. Subrogation.

1. In general.

Since cashier's check is primary obligation of issuing bank (which, acting as both drawer and drawee, accepts check on its issuance) and is not item payable for customer's account within meaning of UCC § 4-403(1), issuing bank was not under any legal obligation to honor stop-payment order of customer, to whom bank had issued cashier's check and who had indorsed and delivered it to a third party, to stop payment before check was paid. Dziurak v. Chase Manhattan Bank, 44 N.Y.2d 776, 377 N.E.2d 474 (1978).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. Maintenance Serv., Inc. v. Royal Nat'l Bank, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

The power of a drawer to stop payment on his check does not release him from liability a subsequent holder in due course of the check. Texico State Bank v. Hullinger, 75 Ill. App. 2d 212, 220 N.E.2d 248 (4th Dist. 1966).

Where a bank issues a teller's check on another bank to depositor payable to a third person, the issuing bank is liable for the amount thereof if it stops payment under the above statute. Malphrus v. Home Sav. Bank, 44 Misc. 2d 705 (1965).

When the Uniform Commercial Code becomes effective in Massachusetts, it will still be the law, as it was at common law and under the Massachusetts version of the Negotiable Instruments Law, that the drawer of a check has an absolute right to order payment stopped, before the order to pay represented by the check is carried out, and that if the drawee bank afterward makes payment thereon, it acts at its peril. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

2. Purpose.

One purpose of granting authority and providing procedure to stop payment of a check as is done in this section is to afford protection to party who may have discovered fraud or engaged in a disagreement as to terms or consideration in connection with the underlying contract pursuant to which check was issued. The other purpose of prescribing procedure for payment stoppage is to protect the bank on which the check is drawn. Malphrus v. Home Sav. Bank, 44 Misc. 2d 705 (1965).

3. Applicability to purchase money order.

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

4. Customer.

Since a bank carrying an account with another bank is a "customer" within the definition in UCC § 4-104 (1e), such a bank may stop payment on a check drawn by it on such other bank under the procedure prescribed by the above statute. Malphrus v. Home Sav. Bank, 44 Misc. 2d 705 (1965).

5. Stop payment order.

Oral request to strike signature of officer from corporation's checking account signature card did not constitute "stop payment order" within meaning of UCC § 4-403, since revocation of authority to execute checks did not constitute countermand to previous payment order. First Piedmont Bank & Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

6. —Exculpatory clauses.

Provision embraced in written request to stop payment of check executed by depositor and providing that should the check be paid through inadvertence, accident or oversight, the bank will in no way be held responsible, and absolving the bank from all liability for payment of the check in the course of the bank's business held invalid as against public policy in permitting the bank to contract against liability for its own negligence. Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954).

7. —Renewal.

Where depositor allegedly entered into oral agreement with bank concerning certain restrictions on his accounts and, pursuant to such agreement, sent letter to bank directing it not to pay any instruments drawn on his accounts unless instruments were on "printed checks of the bank", and where bank merely acknowledged "receipt" of customer's letter, such "receipt" could not be legally interpreted as general, unlimited lifetime "agreement," but at best was receipt of notice of stop payment and, in accord with UCC § 4-403(2) unless renewed in writing, was effective for only six months; stop payment order was not extended beyond statutory limitation by virtue of alleged "oral agreement" simultaneously made with written stop payment order. Dinerman v. National Bank of N. Am., 89 Misc. 2d 164 (1977).

In order to protect himself, issuer of check must either renew a stop payment order every 6 months (UCC § 4-403, subd 2) or close his account since, under UCC § 4-404, a drawee bank may in good faith honor checks over 6 months old without making inquiry of its customer. Advanced Alloys, Inc. v. Sergeant Steel Corp., 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

8. —Effect.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. Taboada v. Bank of Babylon, 95 Misc. 2d 1000 (1978).

Bank draft is check drawn by bank on its own account in another bank; and drawer, being customer, may stop payment prior to acceptance but remains liable on instrument unless some valid defense is interposed. Fulton Nat'l Bank v. Delco Corp., 128 Ga. App. 16, 195 S.E.2d 455 (1973).

9. Payment contrary to stop order.

Where collecting bank accepted for collection check drawn on drawee bank for $25,000 but misencoded such check as $2,500 item; where drawee bank, relying on encoded figure of $2,500, processed check electronically and paid it as $2,500 item; and where drawer of check refused to allow drawee bank to debit drawer's account for remaining $22,500, as between drawee bank and collecting bank, drawee bank was liable under UCC § 4-303 and § 4-403 for undebited sum of $22,500, since after check was acted on by drawee bank, drawer no longer had authority to stop payment thereon. First Nat'l Bank & Trust Co. v. Georgia R.R. Bank & Trust Co., 238 Ga. 693, 235 S.E.2d 1 (1977).

Where check made out to payee for purchase of rug was cashed by bank after stop payment order had been entered on check in question, bank was liable to drawer for amount of check, absent any showing by bank of lesser loss or nonloss on part of drawer. Thomas v. Marine Midland Tinkers Nat'l Bank, 86 Misc. 2d 284 (1976).

Notwithstanding stop payment order contained one digit mistake in describing check to be stopped, adequate notice and reasonable opportunity to act were given to bank pursuant to UCC § 4-403(1) so as to make bank responsible for paying check in contravention of stop payment order where detailed direction was given to bank to stop payment, order was confirmed in writing early in morning, and check was paid afternoon of following day at same bank branch at which stop payment order was given. Thomas v. Marine Midland Tinkers Nat'l Bank, 86 Misc. 2d 284 (1976).

Even though under UCC § 4-406, drawer could not recover for unauthorized signature or any alteration after lapse of 60 days, UCC § 4-406 did not apply to recovery under UCC § 4-403 for payment in contravention of binding stop payment order and drawer had right to recover as matter of law under UCC § 4-403, where written stop payment order was sent to and received by bank so as to afford bank reasonable time to act, bank paid checks in contravention of order within six months, payments were made to persons not authorized to receive payments, and, as a result, drawer suffered loss. Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co., 137 Ga. App. 521, 224 S.E.2d 498 (1976).

Even though check was "improperly" paid by payor bank under UCC § 4-403 after bank had received stop payment order from its customer, check was nonetheless "finally" paid under § 4-213 when customer's account was charged with item; when check was honored by payor bank, provisional settlement received by payee's bank for item became final and money became available for withdrawal by payee as matter of right. Aljax Corp. v. Connecticut Mut. Life Ins. Co., 458 Pa. 57, 333 A.2d 469 (1974).

Where payor bank did not refuse to comply with joint depositor's order to stop payment on other joint depositor's check but payment was caused by computer error, and there was express joint account deposit agreement wherein each joint depositor appointed other as attorney for purpose of disposition of funds in account, stop-payment order was valid whether joint depositor executing stop-payment order was considered agent of other joint depositor concerning disposition of funds or as principal disaffirming act of other joint depositor in making withdrawal, and bank was not entitled to reimbursement. Valley Bank & Trust Co. v. Weyerman Feathers, 30 Utah 2d 161, 514 P.2d 1282 (1973).

Where personal check which formed consideration for cashier's check issued by bank was subject to stop payment order, holder of both cashier's check and personal check could not be charged with bank's failure to respond to stop payment order; and bank was liable for damages resulting from its stopping payment on cashier's check. Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Drawee bank cleared check over stop payment order and deposited proceeds in payee's account; held, drawee bank was precluded from debiting payee's account for proceeds after error was discovered, where funds represented by teller's check drawn by savings and loan association were in fact funds belonging to payee. Wells v. Washington Heights Fed. Sav. & Loan Ass'n, 63 Misc. 2d 424 (1970).

Drawee who has made improper payment in violation of effective stop-payment request is subrogated to rights of payee-holder in due course to whom maker of instrument would have remained liable if payment had been stopped as requested. D. Brewster Bumper Corp. v. Irwin Sav. & Trust Co., 44 Pa. D. & C.2d 138 (1967).

Where a depositor and maker of a check moves for summary judgment pursuant to this section it is part of his prima facie case to allege and thereafter prove that he has been damaged by reason of the bank's wrongful payment of the check after receipt of timely and proper stop-payment order and absent ratification, but this is not to say that a depositor in such circumstances can be compelled against his will to litigate with the check's payee before he can take action against the bank. Cicci v. Lincoln Nat'l Bank & Trust Co., 46 Misc. 2d 465 (1965).

10. Loss.

Since bank which violates valid stop-payment order on check is subrogated under UCC § 4-407(b) to rights of payee against drawer to prevent any unjust enrichment of drawer, it makes little sense to define term "loss," as used in UCC § 4-403(3), to mean amount of check paid by bank when UCC § 4-407(b) gives bank possible subrogation claims against drawer which would reduce amount for which bank might be held liable to drawer. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

In action for wrongful payment of check after stop payment order had been given bank, mere proof of reduction of bank account by amount of check was not proof of loss under this section because if that were acceptable proof of loss there would be no reason for subdivision (3) hereof. Cicci v. Lincoln Nat'l Bank & Trust Co., 46 Misc. 2d 465 (1965).

11. Rights of holder.

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. Garden Check Cashing Serv., Inc. v. First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

12. Pleadings.

A complaint alleging that delivery of a stop payment order to a bank as "sometime during the spring of 1954 and before July 21, 1954 (the exact date being now unknown to Plaintiff)," was objectionable in failing to state the date of the agreement or a reasonably specific date on which the bank customer relied, and in failing to identify sufficiently the persons with whom the customer dealt on behalf of the bank. Dinger v. Market St. Trust Co., 7 Pa. D. & C.2d 674 (1957).

13. Burden of proof.

In absence of North Carolina case law or statements in Official UCC Comments or North Carolina UCC Comments to UCC § 4-403(3) defining "loss" as used in such section, court would conclude that where bank pleads no loss by bank customer from bank's violation of valid stop-payment order on check, customer in order to recover damages for violation of such order must show loss other than mere debiting of customer's bank account with amount of check paid. Otherwise, there would be no reason for enactment of UCC § 4-403(3), which places on customer burden of establishing "amount of loss" resulting from payment of item contrary to binding stop-payment order. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

UCC § 4-403(3) and § 4-407 may present a question as to who has the ultimate burden of proof as to the loss caused to a bank's customer by the bank's violation of a valid stop-payment order on a check. The better rule is to place the ultimate burden of proof of loss on the customer. Initially, the customer establishes a prima-facie case when he shows that the bank paid a check contrary to a valid stop-payment order. Thereupon, the bank, exercising its subrogation rights under UCC § 4-407, has the burden of coming forward and presenting evidence of an absence of actual loss to the customer. When the bank meets the burden of coming forward with such evidence, the customer must then sustain the ultimate burden of proof. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

14. Novation.

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. Jefferies & Co. v. Arkus-Duntov, 357 F. Supp. 1206 (S.D.N.Y. 1973) (applying New York law).

15. Setoff.

Even assuming that bank failed to exercise ordinary care in honoring and paying corporate check signed by former officer of corporation, such action did not constitute, pursuant to UCC §§ 4-402 and 4-403, setoff defense against bank available to guarantor of debts of corporation in absence of assertion and showing of resultant damage to corporation. First Piedmont Bank & Trust Co. v. Doyle, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

Even though purchaser of personal money order had stopped payment and received back from issuing bank the funds he had given for it, bank was not entitled to refuse to pay amount of money order to party who, before payment was stopped, had accepted money order and released automobile on which he had lien for storage services, especially where bank had added to illusion that money orders carried different connotations from checks by providing phrase on money order indicating that it was not valid over $1,000, an amount in excess of money order. Mirabile v. Udoh, 92 Misc. 2d 168 (1977).

16. Subrogation.

Plaintiff bank, which paid the buyer's $19,500 check to the seller over the buyer's stop payment order (Uniform Commercial Code, § 4-403), and then, following a settlement of the dispute over the delivery of defective machinery between the buyer and the seller, agreed to accept $5,000 from the seller in discharge of the seller's obligation to it, thereby relinquishing its rights to proceed in subrogation against the seller, is subrogated to the seller's right against the buyer "under the transaction" to be paid for the merchandise delivered, less $5,000 and undiminished by the settlement, and is additionally entitled to recover from the buyer to the extent that the buyer has been unjustly enriched in the transaction and settlement with the seller (Uniform Commercial Code, § 4-407); the amount to which plaintiff shall be entitled is the greater of the amount by which the buyer was unjustly enriched by payment of the check or the extent to which the seller was entitled to payment from the buyer when the check was issued, in no event exceeding $14,500 and interest. Manufacturers Hanover Trust Co. v. AVA Indus., Inc., 98 Misc. 2d 614 (1978).

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What conduct by drawee of check before receipt of stop payment order, renders order ineffectual. 10 A.L.R.2d 428.

Bank's liability for payment of check drawn by one depositor after stop payment order by joint depositor. 55 A.L.R.2d 975.

Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order. 97 A.L.R.3d 714.

Banks and banking: construction and effect of UCC § 4-403(2) regulating oral or written nature of stop-payment order. 29 A.L.R.4th 228.

Sufficiency of description of check in stop-payment order under UCC § 4-403. 35 A.L.R.4th 985.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions § 945 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:291-4:307. (Relationship between payor bank and customer; stop-payment orders).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2321 et seq. (Right of customer to stop payment).

CJS. 9 C.J.S., Banks and Banking §§ 335, 348-349, 375-377.

§ 75-4-404. Bank not obligated to pay check more than six (6) months old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six (6) months after its date, but it may charge its customer's account for payment made thereafter in good faith.

SOURCES: Codes, 1942, § 41A:4-404; Laws, 1966, ch. 316, § 4-404, eff March 31, 1968.

Cross References — Certification of check, see § 75-3-409.

Obligation of maker, drawer, or acceptor, see §§ 75-3-413, 75-3-414.

JUDICIAL DECISIONS

1. In general.

Although UCC § 4-404 protects a bank which pays a stale check as long as it acted in good faith, it does not eliminate the requirement, imposed by UCC § 4-103(1), of ordinary care that a bank must observe in all its dealings. Thus, when a bank's actions are put in issue, it must show that it exercised the requisite degree of care with regard to its customer. Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231 (La. App. 1978) (holding, where defendant bank paid check more than three years after it had been issued, lost, and customer had placed stop order thereon, that bank had not exercised requisite degree of care toward its customer, and that under UCC § 4-103(5), customer was properly awarded face amount of such check).

While UCC § 4-404 protects bank that pays stale check so long as bank acts in good faith, it does not eliminate requirement of ordinary care which bank must observe in all its dealings. Advanced Alloys, Inc. v. Sergeant Steel Corp., 79 Misc. 2d 149 (1973).

Drawee bank's payment of 14-month-old check without making inquiry of drawer was in good faith under UCC § 1-201, subd 19 and thus permissible under UCC § 4-404 where good faith of drawee bank was not disputed. Advanced Alloys, Inc. v. Sergeant Steel Corp., 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

The phrase "in good faith", as used in UCC § 4-404, refers to the general definition of good faith contained in UCC § 1-201, subd 19. Advanced Alloys, Inc. v. Sergeant Steel Corp., 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

UCC § 4-404, permitting drawee bank to honor check over 6 months old without making inquiry of customer, changes prior case law to the contrary. Advanced Alloys, Inc. v. Sergeant Steel Corp., 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

In order to protect himself, issuer of check must either renew a stop payment order every 6 months (UCC § 4-403, subd 2) or close his account since, under UCC § 4-404, a drawee bank may in good faith honor checks over 6 months old without making inquiry of its customer. Advanced Alloys, Inc. v. Sergeant Steel Corp., 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

Although a bank does not have to pay on a stale check, it may make payment thereon in good faith, and bank was not liable to depositor for making payment on stale check presented 13 months after date of issue and after expiration of order to stop payment. Granite Equip. Leasing Corp. v. Hempstead Bank, 68 Misc. 2d 350 (1971).

In an action by insurance company, as subrogee of bank, for funds paid on two checks, payment of which had been stopped verbally, but which stop payment order had not been confirmed in writing, and which checks were paid more than 14 days after receipt of stop order, bank having credited payee with the amount paid, insurer stood in the shoes of bank and could not recover against payee of the checks in absence of evidence of unjust enrichment. Commercial Ins. Co. v. Scalamandre, 56 Misc. 2d 628 (1967).

The instant section was adopted for the protection of banks and plainly does not have the effect of extinguishing a valid obligation merely because it is more than six months past due. Such a holding would create an extremely short statute of limitations where none was intended by the legislature. Hartsook v. Owens, 236 Ark. 790, 370 S.W.2d 69 (1963).

An action may be brought against a debtor's estate on a debt represented by a check even though the check is more than six months old. Hartsook v. Owens, 236 Ark. 790, 370 S.W.2d 69 (1963).

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 468 et seq.

11 Am. Jur. 2d, Banks and Financial Institutions § 884.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:321-4:324 (Relationship between payor bank and customer; stale checks).

CJS. 9 C.J.S., Banks and Banking §§ 322, 340-344, 354, 355, 360, 364-366, 378, 379, 416.

§ 75-4-405. Death or incompetence of customer.

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for ten (10) days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

SOURCES: Codes, 1942, § 41A:4-405; Laws, 1966, ch. 316, § 4-405; Laws, 1992, ch. 420, § 105, eff from and after January 1, 1993.

Cross References — Deposit of minors, see § 81-5-59.
Death of drawer of check, see § 81-5-63.

JUDICIAL DECISIONS

1. In general.

Where (1) check, drawn on December 3, 1973 on account with insufficient funds by drawer of apparently unstable mind, was dishonored before drawer's death by branch office of defendant bank, (2) payee re-presented check at defendant's main office, and teller who cashed it violated defendant's rule about cashing checks for more than $500 without obtaining manager's approval, (3) drawer's attorney requested defendant to place "hold" order on drawer's account, and two such orders were entered on December 5 and 6, 1973, and (4) on drawer's death, defendant set off amount of check against certificate of deposit held by drawer with defendant, and defendant's estate sought to recover such sum, court held (1) that since check was properly payable on its face and otherwise, defendant under UCC § 4-401(1) had right to charge it against drawer's account, even though such charge created overdraft, (2) teller's violation of rule about cashing checks could not be invoked for benefit of estate, since it was internal bank rule only, (3) prior dishonor of check did not affect defendant's right to pay it on later presentment, and (4) under UCC § 4-405(1), "hold" orders of drawer's attorney on drawer's account were not effective, since drawer had not been adjudicated to be an incompetent. Lincoln Nat'l Bank & Trust Co. v. Peoples Trust Bank, 177 Ind. App. 312, 379 N.E.2d 527 (1978).

In action by administratrix against bank for improperly paying check drawn by decedent, where evidence showed that check was drawn on May 14, 1974 and that defendant was payee thereof; that decedent died on May 30, 1974; that defendant received check from another bank on June 3, 1974 and paid it on June 4, 1974; and that plaintiff on May 31, 1974 informed officer of defendant only about fact of decedent's death, judgment was properly entered for defendant because (1) plaintiff, at time of informing defendant about decedent's death, did not order defendant to stop payment on check as required by UCC § 4-405(2); and (2) UCC § 4-405(2) applied to defendant both as payor bank and also as payee-holder of check. Cirar v. Bank of Hartshorne, 567 P.2d 96 (Okla. 1977).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for $20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that $20,000 should be taken from his estate at death for his son, since drawee bank was not authorized to pay check under UCC § 4-405 more than 10 days after drawer's death, if it knew of fact of death, presentment to bank was entirely excused under UCC § 3-511(2) as futile gesture and provision for direct payment merely restated result prescribed by law in accord with UCC §§ 3-413(2) and 3-507(1) (b). Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977).

Where check given in payment for debt was returned by drawee bank for insufficient funds and not because of drawer's death under UCC § 4-405, debt still existed and payee properly stated cause of action for such debt against decedent drawer's estate. Anderson v. Merriott, 550 P.2d 1320 (Okla. 1976).

Executor of estate of drawer of two checks was entitled to recover amount received by holder of checks when he cashed them two days after death of drawer; UCC § 4-405 applied only to liability of bank for payment of check and was not intended to change relationship between personal representative and persons having claims against estate. Black v. Hart, 301 So. 2d 787 (Fla. App. 1974).

UCC § 4-405 codifies pre-Code rule that payment of check by bank after death of maker was valid when made in good faith without knowledge of death; held, payment cannot be recovered by estate of maker. In re Schenck's Estate, 63 Misc. 2d 721 (1970).

UCC § 4-405 is inapplicable to wrongful dishonor action where decedent's niece requested withdrawal of funds from joint and survivorship account in name of uncle and wife, where niece's proffered power of attorney from decedent was broad and general, and where proffered power of attorney was not presented with signed withdrawal slip as required under withdrawal rules. Beaucar v. Bristol Fed. Sav. & Loan Ass'n, 6 Conn. Cir. Ct. 148, 268 A.2d 679 (1969).

A check revoked by the death of the drawer may in a proper action be used as evidence in support of the payee's claim of indebtedness against the decedent, but not as evidence of the indebtedness itself. Lambeth v. Lewis, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

A declaration filed by the original payee against the administrator of the deceased drawer's estate for payment of the check does not state a cause of action where the order which the check represented has been revoked under the provisions of this section, for under Georgia law a check in the hands of the original payee does not constitute a debt for which a decedent's estate would be liable. Lambeth v. Lewis, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

Although the death of the maker of a check does not terminate his liability upon the instrument it does operate to revoke the authority of the payee to collect from the drawee bank. In re Greene's Estate, 47 Misc. 2d 140 (1965).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 879, 953.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:331-4:337 (Relationship between payor bank and customer; death or incompetency of customer).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2341 et seq. (Payment of item on death or incompetence of customer).

CJS. 9 C.J.S., Banks and Banking §§ 332-335, 336, 340-344, 354-355, 360, 364-366, 416.

§ 75-4-406. Customer's duty to discover and report unauthorized signature or alteration.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven (7) years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because of a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:

(1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty (30) days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 75-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

SOURCES: Codes, 1942, § 41A:4-406; Laws, 1966, ch. 316, § 4-406; Laws, 1992, ch. 420, § 106, eff from and after January 1, 1993.

Cross References — Unauthorized signatures generally, see § 75-3-402.
Negligence contributing to alteration or to unauthorized signature, see § 75-3-406.
Warranties on presentment or transfer, see § 75-3-417.
Warranties of customer or collecting bank, see § 75-4-207.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general; construction with other code sections.
2. Customer's duties; examination.
3. —Examination; timelines.
4. Notice.
5. —Notice; timeliness.
6. Bank's defenses.
7. —Burden of proof.
8. —Same wrongdoer.
9. —Waiver.
10. Bank's negligence; standard of care.
11. —Standard of care; reasonable commercial standards.
12. —Burden of proof.
13. —Negligence barring defenses.
14. —No negligence found.
15. Limitation periods.
16. —One year.
17. —Three years.
18. —Commencement of period.

II. Pre-Uniform Commercial Code Decisions.

19. In general.

I. Under Current Law.

1. In general; construction with other code sections.

UCC § 4-406(4) applies only to actions based on warranties set forth in the Uniform Commercial Code and is inapplicable to negligence actions. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

UCC § 3-406 and § 4-406(2) merely preclude a person who was negligent prior to (UCC § 3-406) or after (UCC § 4-406) a check transaction from asserting an unauthorized signature or alteration against the bank. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978) (where customer, instead of asserting unauthorized signature or alteration against bank, sued bank on theory that it had negligently permitted customer's accountant to divert proceeds of checks drawn by customer).

Even though under UCC § 4-406, drawer could not recover for unauthorized signature or any alteration after lapse of 60 days, UCC § 4-406 did not apply to recovery under UCC § 4-403 for payment in contravention of binding stop payment order and drawer had right to recover as matter of law under UCC § 4-403, where written stop payment order was sent to and received by bank so as to afford bank reasonable time to act, bank paid checks in contravention of order within six months, payments were made to persons not authorized to receive payments, and, as a result, drawer suffered loss. Georgia Motor Club, Inc. v. First Nat'l Bank & Trust Co., 137 Ga. App. 521, 224 S.E.2d 498 (1976).

2. Customer's duties; examination.

Bank customer's delay in detecting forgeries on her checking accounts barred suit against the bank, where the bank fulfilled its duty of making the customer's banking statements available to the customer under Miss. Code Ann. § 75-4-406(a); although the customer claimed that she did not receive numerous statements from the bank, the customer failed to act reasonably when she took no action to replace the missing statements. Union Planters Bank, N.A. v. Rogers, 912 So. 2d 116 (Miss. 2005).

In a case arising from a series of forgeries made by one person on a bank customer's checking accounts, the customer was precluded under Miss. Code Ann. § 75-4-406(d) from making claims against the bank where the customer failed to notify the bank of the forgeries within 15 and or 30 days of the date the customer should have reasonably discovered the forgeries. Union Planters Bank, N.A. v. Rogers, 912 So. 2d 116 (Miss. 2005).

Under UCC § 4-406(4), dealing with customer's duty to discover and report alteration of check within one year, a new one-year period begins to run with each altered check. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature…on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n, 530 S.W.2d 743 (Mo. Ct. App. 1975).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement. Phoenix Assurance Co. v. Davis, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

3. —Examination; timelines.

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defendant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4); and such issue was one of fact. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

Nowhere does the Uniform commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrong doing, but only if the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrong doing, back to the bank under § 4-406(3). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

The failure of a depositor to examine its cancelled checks and statements for a period of 18 months, thereby permitting a series of substantial forgeries to go undetected, would under paragraphs 1, 2, and 3 of this section make the depositor, rather than the bank, liable for the losses incurred, and this was the rule in Kentucky prior to the UCC. Wuest Bros. v. Liberty Nat'l Bank & Trust Co., 388 S.W.2d 364 (Ky. 1965).

4. Notice.

Customer's report to a bank of unauthorized signatures or alterations of checks should be sufficient to at least identify the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted. Century Constr. Co., LLC v. BancorpSouth Bank, 117 So. 3d 345 (Miss. Ct. App. 2013).

Though a customer notified the bank about forgeries on its account, it did not give the required statutory notice until it sent the bank a ledger listing the checks the bank paid that had been forged. Century Constr. Co., LLC v. BancorpSouth Bank, 117 So. 3d 345 (Miss. Ct. App. 2013).

The report of forgery to the bank that is required by UCC § 4-406(4) need not be in the form of the customary affidavit of forgeries or in the form of any other notice. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defendant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4), and such issue was one of fact. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

The notice of forgery may be oral. Duralite Co. v. New Jersey Bank & Trust Co., 97 N.J. Super. 48, 234 A.2d 247 (App. Div. 1967).

5. —Notice; timeliness.

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and under Miss. Code Ann. § 75-4-103(a), the statutory one-year notice provision for unauthorized signatures could be varied by the deposit agreement. Century Constr. Co., LLC v. BancorpSouth Bank, 117 So. 3d 345 (Miss. Ct. App. 2013).

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1) it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. Sun'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 582 P.2d 920 (1978).

UCC § 4-406(4) places an absolute time limit on the right of a customer to make a claim for the payment of altered or forged instruments. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

Depositary bank that collected check bearing forged endorsement was liable to collecting bank on its warranty of good title and guarantee of prior endorsements under UCC § 4-207(1), and collecting bank was similarly liable to drawee bank, notwithstanding drawer delayed 6 months in notifying drawee of suspected forgery; assuming drawer's delay in notifying drawee of suspected forgery was unreasonable under UCC § 4-406, depositary bank was not discharged from liability for breach of warranty of good title under UCC § 4-207(4) absent evidence that any party sustained loss caused by delay. Michigan Nat'l Bank v. American Nat'l Bank & Trust Co., 34 Ill. App. 3d 30, 339 N.E.2d 375 (1st Dist. 1975).

Code § 4-406 did not preclude claim against drawee bank for payment of check upon unauthorized endorsement, where evidence indicated that drawer acted with reasonable promptness upon learning that payee had not received check, and drawee bank had not established that it suffered any loss by reason of drawer's 60-day delay in making demand upon bank for reimbursement. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

6. Bank's defenses.

General pattern of UCC §§ 3-406 and 4-406 is to absolve payor bank, which has been deceived by third party, from liability to its customer if customer's negligence played substantial part in making deception possible; however, bank is absolved from liability only if it has acted with reasonable care or in accordance with reasonable banking standards. Transamerica Ins. Co. v. United States Nat'l Bank, 276 Or. 945, 558 P.2d 328 (1976).

Depositor was guilty of negligence which precluded her from holding bank liable on forged checks where trusted employee of customer forged checks and directed bank to send customer's bank statements to post office box in name of employee and customer did not receive any bank statements for 26 months, during which time there were several overdrafts on account which made customer suspicious but about which she did not do anything other than to make additional deposits to overcome overdrafts. Westport Bank & Trust Co. v. Lodge, 164 Conn. 604, 325 A.2d 222 (1973).

7. —Burden of proof.

Where depository bank improperly encoded check issued in amount of $45 to read $10,045, check was forwarded for collection, paid and amount of $10,045 deducted from customer's account, payor bank was required to reimburse customer for wrongful payment, notwithstanding payor bank sent statement to customer which provided that account would be considered correct and checks genuine if no error was reported within ten days and customer did not examine cancelled check when it was received and did not report error for seven and one-half months: there was no showing that customer's delay in giving notice caused loss greater than bank sustained when it paid improperly encoded check and, in addition, UCC § 4-406 which applies to forged or altered checks provides that one year is proper period in which to notify bank of forged or altered checks thus, in effect, establishing one year as length of time deemed to be reasonable under circumstances of present case. State ex rel. Gabalac v. Firestone Bank, 46 Ohio App. 2d 124, 346 N.E.2d 326 (1975).

8. —Same wrongdoer.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's fund, rather than union's funds, under common-law doctrine of Price v. Neal (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based). United States v.

Pavloski, 574 F.2d 933 (7th Cir. Wis. 1978).

Where the trusted employee of the drawer is the forger, the employer is not barred because the employer relied on the trusted employee where the circumstances are such that this reliance was reasonably justified and the bank statements and cancelled checks were sent to this same employee. Jackson v. First Nat'l Bank, Inc., 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

9. —Waiver.

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

Where copayee obtained check, drawn to himself and automobile dealer, from drawer-lender, by misrepresenting that he was purchasing automobile, and by forging copayee's indorsement obtained payment from collecting bank, which forwarded check to drawee bank, which paid check to collecting bank and charged drawee's account, but credited drawee's account upon learning of forged indorsement, there was presented no such negligence of drawer, within meaning of § 3-406, as would preclude drawer from asserting forgery against drawee, so that drawer's failure to assert such defense would not preclude drawee bank under § 4-406(5) from prosecuting its claim against collecting bank. East Gadsden Bank v. First City Nat'l Bank, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Payor bank which made final payment of check drawn on fictitious account, instead of returning check or giving notice of dishonor within time prescribed by Code, was not entitled to recover amount of erroneous payment from indorser. Samples v. Trust Co., 118 Ga. App. 307, 163 S.E.2d 325 (1968).

10. Bank's negligence; standard of care.

In a case arising from a series of forgeries made by one person on a bank customer's checking accounts, the circuit judge erred in denying the bank's motion for judgment notwithstanding the verdict because, under Miss. Code Ann. § 75-4-406(e), the customer failed to inspect her bank statements in a timely manner and because the customer produced no evidence that the bank had failed to exercise ordinary care or that it acted with bad faith in paying the checks. Union Planters Bank, N.A. v. Rogers, 912 So. 2d 116 (Miss. 2005).

UCC § 3-406 and § 4-406(2) preclude recovery by customer from bank only if bank paid instrument in accordance with reasonable commercial standards (see UCC § 3-406) or ordinary care (see UCC § 4-406(3)). Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978) (holding that since bank was negligent as a matter of law in paying checks presented by customer's accountant and thereby permitting accountant to divert proceeds of checks to his own use, bank could not claim benefit of either UCC § 3-406 or § 4-406(2)).

Where (1) accountant, who was not authorized to sign checks on behalf of plaintiff corporation or to make deposits into any account other than plaintiff's tax and loan account with defendant bank, presented over a period of time a total of eleven checks to defendant which were signed by plaintiff's president, made payable to defendant, and intended to be deposited into plaintiff's tax and loan account, (2) some of such checks were signed in blank by plaintiff's president and filled in by accountant, which he had authority to do, (3) defendant knew about limitation on accountant's authority, but nevertheless permitted accountant on several occasions to deposit part of a check's proceeds into tax and loan account and remainder into either accountant's personal account or some other account, (4) defendant also allowed accountant to purchase cashier's check with proceeds of one check and to have it made payable to payee designated by accountant, and (5) defendant never required accountant to indorse checks presented or made any inquiry into his authority to use plaintiff's funds in unauthorized manner, court held (1) that defendant had been negligent as a matter of law in dealing with plaintiff's funds, (2) that although Uniform Commercial Code does not expressly state that bank is liable for negligently paying item, bank must nevertheless use ordinary care in disbursing depositor's funds, (3) that reasonableness of defendant bank's conduct could be assessed in light of plaintiff's conduct, (4) that under pre-code rule not displaced by UCC, where check is drawn to order of bank to which drawer is not indebted, bank (a) is authorized to pay proceeds only to persons specified by drawer, (b) takes risk in treating check as payable to bearer, and (c) is placed on inquiry as to authority of drawer's agent to receive payment himself, (5) that if drawer clothes agent with apparent authority to receive proceeds of check made payable to bank's order, bank is not liable to drawer for paying proceeds to agent or applying proceeds in manner specified by agent contrary to his actual authority, (6) that in present case, defendant, as a matter of law, had breached contract implied in normal banking relationship with plaintiff and thus had been negligent in its treatment of plaintiff's funds, (7) that plaintiff had not been aware of defendant's conduct in allowing accountant to divert part of proceeds of plaintiff's checks to accountant's use, (8) that plaintiff had not knowingly assented to defendant's practice of treating checks payable to defendant's order as bearer paper if both drawer and bearer were known to defendant's teller, (9) that defendant's negligence in disbursing plaintiff's funds also could not be successfully defended, either under either UCC § 3-406 (dealing with negligence contributing to alteration or unauthorized signature) or UCC § 4-406 (dealing with customer's duty to discover and report unauthorized signature or alteration), on ground that plaintiff had been negligent in signing some checks in blank and not checking accountant's examination of plaintiff's monthly bank statements, since defendant had been negligent as a matter of law in paying proceeds of checks to accountant, and (10) that UCC § 3-406 and § 4-406(2) and (4) were also inapplicable because plaintiff was not asserting unauthorized signature or alteration against defendant. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

The question whether a bank was negligent in paying an item-that is, whether it paid the item in accordance with reasonable commercial standards under UCC § 3-406 and § 4-406-is one that must be decided on the facts of each particular case. The reasonableness of the bank's conduct, of course, may be assessed in light of the plaintiff's conduct. Bank of S. Md. v. Robertson's Crab House, Inc., 39 Md. App. 707, 389 A.2d 388 (1978).

Corporation failed to establish lack of ordinary care by bank where bank assigned clerk, who was responsible for approximately 200 accounts and who examined all checks from each account daily, comparing signatures on checks with memorization of signature on customer's signature card, where forgeries were sufficiently adroit so as to escape detection by such methods, and where method used by bank was substantially same as that employed by other commercial banks in area. On other hand, customer did establish bank's lack of ordinary care with respect to altered checks where alterations were so maladroitly performed that they should have been readily discovered. Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n, 530 S.W.2d 743 (Mo. Ct. App. 1975).

Where employee of drawer-drawee bank caused checks to be issued to order of payee bank and where payee bank, without inquiry, deposited checks to personal account of employee, who subsequently absconded with funds, drawee bank was chargeable with exercising same degree of care and control of its accounts that individual depositor would have been expected to exercise under UCC § 4-406. Federal Ins. Co. v. Groveland State Bank, 37 N.Y.2d 252, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Bank which fails to use ordinary care in making payment cannot escape liability through reliance on its customer's failure to perform his post-payment duties. Taylor v. Equitable Trust Co., 269 Md. 149, 304 A.2d 838 (1973).

If the customer's evidence that convinced the jury that the bank exhibited a lack of ordinary care in paying the forged checks, then the failure of the customer to exercise reasonable care in examining the statements and checks and notifying the bank of the forgeries would not preclude the customer from asserting the unauthorized signatures on the checks and the bank's breach of its agreement with the customer. Hardex-Steubenville Corp. v. Western Pa. Nat'l Bank, 446 Pa. 446, 285 A.2d 874 (1971).

11. —Standard of care; reasonable commercial standards.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. Seattle-First Nat'l Bank v. Pacific Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Bank customer that permits its bookkeeper to prepare checks and to balance customer's bank statements without any supervision does not exercise reasonable care within meaning of UCC § 4-406(1) and is therefore precluded by UCC § 4-406(2)(a) and (b) from asserting against bank forgeries by bookkeeper on other items paid by bank in good faith after initial forged item was available to the customer for period of not more than 14 days. In such case, knowledge of customer's dishonest employee is charged to customer for purpose of determining when first item and statement became "available" to customer within meaning of UCC § 4-406(2)(b). However, the preclusion of UCC § 4-406(2) is made inapplicable by UCC § 4-406(3) if customer can establish that bank failed to use ordinary care in paying first forged item. George Whalley Co. v. National City Bank, 55 Ohio App. 2d 205, 380 N.E.2d 742 (1977) (holding that customer was precluded from asserting unauthorized signature on items paid by bank after 14 days following customer's receipt of bank statement, that customer failed to establish bank's lack of ordinary care in cashing first check forged by customer's employee, and that evidence supported trial court's judgment that bank was only liable for three forged items charged to customer during 14-day period following customer's receipt of bank statement).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

A negligent depositor is not precluded from asserting a claim if he establishes that the bank's payment of forged checks was not in accordance with reasonable commercial standards. Exchange Bank & Trust Co. v. Kidwell Constr. Co., 472 S.W.2d 117 (Tex. 1971).

12. —Burden of proof.

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature...on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n, 530 S.W.2d 743 (Mo. Ct. App. 1975).

Lack of ordinary care on part of drawee bank in paying items containing unauthorized signatures may be established by proof either that bank's procedures were below standard or that bank's employees failed to exercise care in processing items. First Nat'l Bank & Trust Co. v. Cutright, 189 Neb. 805, 205 N.W.2d 542 (1973).

The former rule in Wisconsin that a bank must prove itself free of negligence in charging forged checks against its depositor's account has been changed by subdivision (3) of this section which imposes upon the depositor a burden of establishing a bank's negligence. Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 138 N.W.2d 157 (1965).

13. —Negligence barring defenses.

Bank was precluded from using defense that customer did not promptly notify bank of unauthorized signature after statements were available to customer, where evidence showed lack of care on part of bank in paying checks signed by unauthorized person. First Nat'l Bank v. Hobbs, 248 Ark. 76, 450 S.W.2d 298 (1970).

Bank which paid forged checks drawn on the trust account of a church and payable to the order of the forger, many of which checks bore the endorsement of a company operating a race track, was put on inquiry as to whether the sums represented by the checks were being withdrawn for unauthorized purposes, and was guilty of negligence for failing to inquire. Jackson v. First Nat'l Bank, Inc., 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

14. —No negligence found.

Finding that bank had not been negligent in paying checks on which depositor's signature as drawer had been forged by depositor's bookkeeper, and that bank in defending suit by depositor could therefore utilize affirmative defenses afforded by UCC § 3-406 and UCC § 4-406, would not be upset on appeal where such finding was supported by substantial evidence in record. Parsons Travel, Inc. v. Hoag, 18 Wash. App. 588, 570 P.2d 445 (1977).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared no where on instruments; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. Federal Ins. Co. v. Groveland State Bank, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Position that bank had acted in good faith and with ordinary care was supported by testimony in record that bank had cashed no checks not bearing names of both plaintiffs, that tellers had checked the signatures against the formal signature card until they were familiar with plaintiff and with the signatures, and that the forgeries were so skillful as to escape detection. Terry v. Puget Sound Nat'l Bank, 80 Wash. 2d 157, 492 P.2d 534 (1972).

A bank is not negligent in exchanging its cashier's check made out to a named payee for a personal check drawn by its customer to the same payee and bearing a forged endorsement. Society Nat'l Bank v. Capital Nat'l Bank, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

15. Limitation periods.

The one-year period from the receipt of the bank statement within which a bank customer must "discover and report his unauthorized signature or any alteration of the face of or back of the item" and the three-year period within which a customer must "discover and report any unauthorized indorsement" or be "precluded from asserting against the bank such unauthorized signature or indorsement" (Uniform Commercial Code, § 4-406, subd [4]) are not Statutes of Limitations but are instead conditions precedent to asserting a claim against the bank for honoring an unauthorized signature so that a breach of contract action based upon defendant bank's cashing of forged checks drawn on plaintiff's account commenced within the six-year time period (CPLR 213, subd 2) would be barred if no "report" were given. Since the statute does not describe the form of the "report" of forgery to the bank, there being no requirement that the "report" be in the form of a "customary affidavit of forgeries or any other notice", a question of fact remains as to whether plaintiff's complaints to defendant of "unexplained overdrafts" constituted a "report" of the forgeries, sufficient to defeat defendant's motion for summary judgment. American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715 (1978).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank, 82 Misc. 2d 1013 (1975).

16. —One year.

Where depository bank improperly encoded check issued in amount of $45 to read $10,045, check was forwarded for collection, paid and amount of $10,045 deducted from customer's account, payor bank was required to reimburse customer for wrongful payment, notwithstanding payor bank sent statement to customer which provided that account would be considered correct and checks genuine if no error was reported within ten days and customer did not examine cancelled check when it was received and did not report error for seven and one-half months: there was no showing that customer's delay in giving notice caused loss greater than bank sustained when it paid improperly encoded check and, in addition, UCC § 4-406 which applies to forged or altered checks provides that one year is proper period in which to notify bank of forged or altered checks thus, in effect, establishing one year as length of time deemed to be reasonable under circumstances of present case. State ex rel. Gabalac v. Firestone Bank, 46 Ohio App. 2d 124, 346 N.E.2d 326 (1975).

In action by trustees of trust fund against bank to recover for funds allegedly withdrawn from trust fund bank account by one trustee, with approval and consent of bank, in violation of trust and without proper authority, checks drawn on trust fund checking account and signed by one trustee were paid on unauthorized signatures under UCC § 4-406 where authorized signature of trust fund required joint signatures of three trustees; thus, trustees' action against bank was barred since items on which complaint was based were paid by bank on unauthorized signatures, one year statutory period of UCC § 4-406(4) applied to liability of bank and suit was not filed for more than three years thereafter. Pine Bluff Nat'l Bank v. Kesterson, 257 Ark. 813, 520 S.W.2d 253 (1975).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

If item meets test of being forged on both face and back, depositor can only rely on forgery on face of item if he notifies bank within 60 days after instrument is made available for his examination, but he can still rely on forged indorsement on back of item as basis for unauthorized payment if he gives notice within applicable one year period; held, trial court did not err in refusing to grant summary judgment to defendant-bank limiting liability on unauthorized payments from plaintiff's account where it could not be said, as matter of law, that bank had paid items solely on account of forgeries on face of items. Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

Suit in California by drawer on contract principles is barred by one-year statute of limitations, whether brought against drawee bank, collecting bank, or depository bank. Allied Concord Fin. Corp. v. Bank of Am., 275 Cal. App. 2d 1 (2d Dist. 1969).

Subsection (4) of § 4-406 of the Georgia Uniform Commercial Code, while carrying forward the one-year limitation, modifies somewhat a statute providing that no bank which has paid in good faith a check bearing a forged or unauthorized indorsement shall be liable to any person for such payment unless within one year after payment the drawer of the check or some subsequent indorser or holder thereof shall notify the bank in writing that the check bore a forged or unauthorized indorsement. Indemnity Ins. Co. of N. Am. v. Fulton Nat'l Bank, 108 Ga. App. 356, 133 S.E.2d 43 (1963).

17. —Three years.

Depositor did not give notice of forged endorsements within 3 years of his receipt of statement of account accompanied by cancelled checks; held, depositor's claim for wrongful dishonor was barred. Billings v. East River Sav. Bank, 33 A.D.2d 997 (1st Dep't 1970).

18. —Commencement of period.

In action to recover losses incurred when bank paid forged checks which had been drawn on plaintiffs' account by their bookkeeper, there was no triable issue of fact, and, thus, trial court properly granted bank's motion for partial summary judgment, excluding recovery on all forged checks which had been paid and returned more than one year prior to filing of complaint, pursuant to California version of UCC § 4-406, providing that action against bank must be brought within one year after bank mailed to its customer statements of account accompanied by items paid in good faith, where there was neither allegation, nor any evidence, that bank acted dishonestly or that items had not been paid in good faith. Period of limitations for each check began running when bank mailed statements of account and items paid to plaintiffs pursuant to § 4-406, and not when plaintiffs received statements of account from bank. Section 4-406 placed burden upon bank customer to examine statements regularly and discover any forgery or alterations on any item included therein so long as bank met its duty of making available statement of account and items paid to customer. The fact that employee of bank's customer concealed forgery did not obviate customer's responsibility to examine his own bank statements. Kiernan v. Union Bank, 55 Cal. App. 3d 111 (1st Dist. 1976).

Where bank honored checks drawn on joint venture account, although checks did not carry required signature of one of two joint venturers, absence of one of two or more necessary signatures did not constitute "unauthorized signature" within meaning of UCC § 4-406 and, thus, action against bank to recover for improper payment of checks, commenced more than one year after statement of account was sent to joint venturers, was not barred by UCC § 4-406(4). G & R Corp. v. American Sec. & Trust Co., 523 F.2d 1164, 173 U.S. App. D.C. 215 (1975) (applying District of Columbia law).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

An action begun against a bank more than a year after notice was given of forgeries is barred by the statute of limitations. Duralite Co. v. New Jersey Bank & Trust Co., 97 N.J. Super. 48, 234 A.2d 247 (App. Div. 1967).

II. Pre-Uniform Commercial Code Decisions.

19. In general.

This statute does not apply to a depositor's action against a bank for negligently cashing checks drawn by an unauthorized person. Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962).

RESEARCH REFERENCES

ALR. Construction and effect of statutes relieving bank from liability to depositor for payment of forged or raised check unless within specified time after the return of voucher representing payment he notifies bank as to forgery or raising. 50 A.L.R.2d 1115.

Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted. 60 A.L.R.2d 708.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified paid check which was altered. 75 A.L.R.2d 611.

Bank's liability for payment or withdrawal on less than required number of signatures. 7 A.L.R.4th 655.

Construction and application of UCC § 4-406, requiring customer to discover and report unauthorized signature, in cases involving bank's payment of check or withdrawal on less than required number of signatures. 7 A.L.R.4th 1111.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 880, 901, 902.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:351-4:365 (Relationship between payor bank and customer; unauthorized signature or alteration; customer's duty).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2351 et seq. (Duty of customer to discover and report unauthorized signature or alteration).

CJS. 9 C.J.S., Banks and Banking §§ 278, 279, 332, 333, 336, 340-343, 350, 372, 441-443, 446, 461-463, 467, 485.

§ 75-4-407. Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

(1) Of any holder in due course on the item against the drawer or maker;

(2) Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(3) Of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

SOURCES: Codes, 1942, § 41A:4-407; Laws, 1966, ch. 316, § 4-407; Laws, 1992, ch. 420, § 107, eff from and after January 1, 1993.

Cross References — Stop payment orders, see § 75-4-403.

JUDICIAL DECISIONS

1. In general.

Plaintiff bank, which paid the buyer's $19,500 check to the seller over the buyer's stop payment order (Uniform Commercial Code, § 4-403), and then, following a settlement of the dispute over the delivery of defective machinery between the buyer and the seller, agreed to accept $5,000 from the seller in discharge of the seller's obligation to it, thereby relinquishing its rights to proceed in subrogation against the seller, is subrogated to the seller's right against the buyer "under the transaction" to be paid for the merchandise delivered, less $5,000 and undiminished by the settlement, and is additionally entitled to recover from the buyer to the extent that the buyer has been unjustly enriched in the transaction and settlement with the seller (Uniform Commercial Code, § 4-407); the amount to which plaintiff shall be entitled is the greater of the amount by which the buyer was unjustly enriched by payment of the check or the extent to which the seller was entitled to payment from the buyer when the check was issued, in no event exceeding $14,500 and interest. Manufacturers Hanover Trust Co. v. AVA Indus., Inc., 98 Misc. 2d 614 (1978).

Plaintiff payor bank, which made payment of a check with a forged drawer's signature, and which is therefore bound by its payment if no warranties are applicable or if defendant, the prior indorser, was a holder in due course or a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), may not, on a motion for summary judgment, recover such payment from defendant pursuant to the warranty given by a customer of a payor bank with respect to the drawer's signature (Uniform Commercial Code, § 4-207, subd [1], par [b]) since triable questions of fact exist as to whether defendant had knowledge of the forgery, was a holder in due course or a person who in good faith changed his position in reliance on plaintiff's payment. Plaintiff's position is not improved by subrogation to the drawer's rights (Uniform Commercial Code, § 4-407, subd [c]) since a drawer's rights against a holder who has obtained payment of a check with a forged drawer's signature are even fewer than those of the payor bank, the limited warranty of section 4-207 (subd [1], par [b]) not being given to the drawer with respect to the drawer's own signature by any customer that is a holder in due course and acts in good faith. Marine Midland Bank v. Umber, 96 Misc. 2d 835 (1978).

Under UCC § 3-116(b), unless a check payable to the order of two or more payees is in the alternative, a bank can accept and pay it only on the indorsement of all payees. Trust Co. v. Refrigeration Supplies, Inc., 241 Ga. 406, 246 S.E.2d 282 (1978), on remand, 146 Ga. App. 825, 247 S.E.2d 542 (1978) (case involving payment of check, jointly payable to both subcontractor and materialman, without obtaining materialman's indorsement, wherein court also stated that subrogation rights granted by UCC § 4-407(c) to payor bank could not be used to defeat materialman's claim, and that court of appeals correctly held that both collecting and drawee banks were liable to materialman as a matter of law).

UCC § 4-403(3) and § 4-407 may present a question as to who has the ultimate burden of proof as to the loss caused to a bank's customer by the bank's violation of a valid stop-payment order on a check. The better rule is to place the ultimate burden of proof of loss on the customer. Initially, the customer establishes a prima-facie case when he shows that the bank paid a check contrary to a valid stop-payment order. Thereupon, the bank, exercising its subrogation rights under UCC § 4-407, has the burden of coming forward and presenting evidence of an absence of actual loss to the customer. When the bank meets the burden of coming forward with such evidence, the customer must then sustain the ultimate burden of proof. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Since bank which violates valid stop-payment order on check is subrogated under UCC § 4-407(b) to rights of payee against drawer to prevent any unjust enrichment of drawer, it makes little sense to define term "loss," as used in UCC § 4-403(3), to mean amount of check paid by bank when UCC § 4-407(b) gives bank possible subrogation claims against drawer which would reduce amount for which bank might be held liable to drawer. Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978).

Where checks were dishonored but were not returned within time limits prescribed by UCC § 4-302, payor bank was liable to payees for face amount of checks less any payments received with respect thereto, notwithstanding payor bank's claim that due to short period of time between dishonor and drawer's bankruptcy, payees would have been unable, assuming timely return, to have obtained judgment against drawer, or even assuming payment, payees would not have been able to retain monies received since payment would represent voidable preference as against drawer's other creditors. Furthermore, payor bank failed to establish any right of subrogation under UCC § 4-407 and, thus, was not entitled to assert against payees any claims which might exist in favor of drawer of checks. Met Frozen Food Corp. v. National Bank of N. Am., 89 Misc. 2d 1033 (1977).

Where check made out to payee for purchase of rug was cashed by bank after stop payment order had been entered on check in question, bank was liable to drawer for amount of check, absent any showing by bank of lesser loss or nonloss on part of drawer. Thomas v. Marine Midland Tinkers Nat'l Bank, 86 Misc. 2d 284 (1976).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of $300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of $300 should bear signature of two specified signatories, president, rather than corporation, was drawer for purposes of UCC § 4-407 which, inter alia, subrogates payor bank to rights of drawer or maker against its payee, where, under UCC § 3-403(2), president, by not signing in representative capacity, became personally liable in place of corporation, and where bank had actual notice that agent's signature was not enough to bind corporation. Neo-Tech Sys. v. Provident Bank, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

Where corporate check, which was payable to plaintiff and was made out by her dying husband on corporate account, was deposited in her account in same bank on which check was drawn, and plaintiff's stepson, acting for corporation, stopped payment on check, but bank did not charge back and reverse plaintiff's provisional credit before midnight of banking day following receipt or send written notice until seven days later, plaintiff had absolute right to draw upon funds, and payment of item had become final by passage of time. However, bank was subrogated to corporate drawer's rights against plaintiff notwithstanding fact that bank never debited corporate account and fact that trial court granted summary judgment in favor of corporate drawer against bank, which was final and nonvacatable, thus preventing corporate drawer from suffering any loss. Sunshine v. Bankers Trust Co., 34 N.Y.2d 404, 314 N.E.2d 860 (1974).

Payor bank which did not pay or return check and did not send notice of dishonor until after midnight deadline was liable to payee for full amount of check; however, bank was apparently entitled to subrogation under UCC § 4-407. AH-RS Coal Corp. v. Farmers Nat'l Bank, 63 Pa. D. & C.2d 203 (1973).

Bank which failed to honor "stop payment" order and subsequently reimburse drawers of check was required as subrogee of drawers in action against payee to prove that drawers would have been entitled to recover from payee had check been paid or, conversely, had check not been paid, that drawers would have had valid defense to claim by payee. First Nat'l Bank v. Heatherly, 8 Ill. App. 3d 1073, 291 N.E.2d 280 (5th Dist. 1972).

By this section the Legislature intended to grant to a payor bank which had mistakenly paid an item over the stop-payment order of the drawer or maker, a full and effective remedy by way of subrogation to the rights and remedies of the drawer or maker against the payee as well as those who have, by their tortious acts in concert with him, combined to produce the single indivisible result, such remedy being furnished not only to prevent unjust enrichment but also to the extent necessary to prevent loss to the bank by reason of its payment of the item. There is no requirement that all of the defendants who may be joined in the action be "unjustly enriched". South Shore Nat'l Bank v. Donner, 104 N.J. Super. 169, 249 A.2d 25 (L. Div. 1969).

In an action by insurance company, as subrogee of bank for funds paid on two checks, payment of which had been stopped verbally, but which stop payment order had not been confirmed in writing, and which checks were paid more than 14 days after receipt of stop order, bank having credited payee with the amount paid, insurer stood in the shoes of bank and could not recover against payee of the checks in absence of evidence of unjust enrichment. Commercial Ins. Co. v. Scalamandre, 56 Misc. 2d 628 (1967).

The provisions of UCC § 4-407 are not limited to the case of payment in disregard of a stop-payment order but extends to any improper payment and therefore applies when a postdated check is paid before its date arrives. Peck v. Franklin Nat'l Bank, 4 U.C.C. Rep. Serv. 861 (N.Y. App. Term 1967).

A depositary bank which honored checks presented to it by a collecting bank which was a holder in due course, over its customer's stop payment order, and debited the amount of the checks from its customer's account, was not liable to its customer either because it was subrogated to the rights of the collecting bankholder in due course, or because the customer did not bear its burden of showing that it suffered loss from the depositary bank's disregard of the stop payment order. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

A bank depositor who executed a "Request to Stop Payment of Check," in which he released the bank from liability in paying the check through "inadvertence, accident or oversight," could nevertheless recover the amount of the check from the bank because the agreement released the bank from liability for its negligence and was therefore void as against public policy. Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 905 et seq., 908 et seq., 927.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:381, 4:382 (Relationship between payor bank and customer; subrogation rights of bank).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4 — Bank Deposits and Collections, § 253:2361 et seq. (Right of payor bank to subrogation on improper payment).

CJS. 9 C.J.S., Banks and Banking §§ 332, 335, 340-343, 345, 359-363, 372, 373, 376, 377, 441-443, 464-466, 473, 475.

83 C.J.S., Subrogation § 46.

PART 5.

COLLECTION OF DOCUMENTARY DRAFTS.

SEC.
75-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.
75-4-502. Presentment of "on arrival" drafts.
75-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.
75-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

§ 75-4-501. Handling of documentary drafts; duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

SOURCES: Codes, 1942, § 41A:4-501; Laws, 1966, ch. 316, § 4-501; Laws, 1992, ch. 420, § 108, eff from and after January 1, 1993.

Cross References — Collecting bank as agent or subagent of owner of item, see § 75-4-201.

Collecting bank using ordinary care, responsibility, see § 75-4-202.

Effect of instructions to collecting bank, see § 75-4-203.

Collection items, methods of sending and presenting, see 75-4-204.

Presentation, by written notice, of items not payable by, through or at bank, see § 75-4-212.

Letters of credit, use of credit in portions, relinquishment or reservation of claim to documents, see § 75-5-110.

Letters of credit, warranties on transfer and presentment of documentary draft or demand for payment, see § 75-5-111.

Letters of credit, time allowed for honor or rejection of documentary draft or demand for payment, see § 75-5-112.

Letters of credit, indemnity agreement to induce honor, negotiation or reimbursement, see § 75-5-113.

Limitations on acceptances, see § 81-5-89.

JUDICIAL DECISIONS

1. In general.

Collecting bank failed to comply with duties imposed on it by UCC §§ 4-501 and 4-503 and was therefore liable to payee of two documentary drafts where bank's customer, an automobile dealer, drew drafts on bank payable to payee, another automobile dealer, in payment for two automobiles which dealer purchased from payee, payee forwarded drafts to bank for collection, accompanied by titles to automobiles, where bank received drafts on October 30 and November 30, respectively, but did not collect or return them until January, when they were returned unpaid, where, during that time, cars in question, represented by titles attached to drafts, were sold, encumbered and delivered to third parties, and where bank financed sales of automobiles to third parties without requiring any evidence of title to vehicles, and without payment of drafts which contained titles involved, as shown by records of bank. Suttle Motor Corp. v. Citizens Bank, 216 Va. 568, 221 S.E.2d 784 (1976).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 962, 967, 971, 976, 983.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Form 4:393 (Instruction to jury; handling of documentary draft; duty of presentment and notice of dishonor).

CJS. 9 C.J.S., Banks and Banking § 407 et seq.

§ 75-4-502. Presentment of "on arrival" drafts.

If a draft or the relevant instructions require presentment "on arrival," "when goods arrive" or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

SOURCES: Codes, 1942, § 41A:4-502; Laws, 1966, ch. 316, § 4-502; Laws, 1992, ch. 420, § 109, eff from and after January 1, 1993.

Cross References — Collecting bank using ordinary care, responsibility, see § 75-4-202.

Effect of instructions to collecting bank, see § 75-4-203.

Letters of credit, time allowed for honor or rejection of documentary draft or demand for payment, see § 75-5-112.

Limitations upon acceptances, see § 81-5-89.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Pre-Uniform Commercial Code Decisions.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Pre-Uniform Commercial Code Decisions.

6. In general.

Neither statute preventing for ninety-six hours remission of proceeds of draft, nor attachment suit, converted collecting bank into trustee for forwarding bank or latter's principal. Love v. Fulton Iron Works, 162 Miss. 890, 140 So. 528 (1932).

Bank collecting drafts with bill of lading attached does not hold sums collected in trust. Alexander County Nat'l Bank v. Conner, 110 Miss. 653, 70 So. 827 (1916).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions § 971 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:392, 4:394 (Collection of documentary drafts).

CJS. 9 C.J.S., Banks and Banking § 417.

§ 75-4-503. Responsibility of presenting bank for documents and goods; report of reasons for dishonor; referee in case of need.

Unless otherwise instructed and except as provided in Chapter 5, a bank presenting a documentary draft:

(1) Must deliver the documents to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment; and

(2) Upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee's services, it must use diligence and good faith to

ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions. However, the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses.

SOURCES: Codes, 1942, § 41A:4-503; Laws, 1966, ch. 316, § 4-503; Laws, 1992, ch. 420, § 110, eff from and after January 1, 1993.

Cross References — Drafts drawn under letters of credit, see §§ 75-5-109 to 75-5-114.

Privilege of presenting bank to deal with goods following dishonor of documentary draft, see § 75-4-504.

When sales documents deliverable on acceptance, when on payment, see § 75-2-514.

JUDICIAL DECISIONS

1. In general.

Collecting bank failed to comply with duties imposed on it by UCC §§ 4-501 and 4-503 and was therefore liable to payee of two documentary drafts where bank's customer, an automobile dealer, drew drafts on bank payable to payee, another automobile dealer, in payment for two automobiles which dealer purchased from payee, payee forwarded drafts to bank for collection, accompanied by titles to automobiles, where bank received drafts on October 30 and November 30, respectively, but did not collect or return them until January, when they were returned unpaid, where, during that time, cars in question, represented by titles attached to drafts, were sold, encumbered and delivered to third parties, and where bank financed sales of automobiles to third parties without requiring any evidence of title to vehicles, and without payment of drafts which contained titles involved, as shown by records of bank. Suttle Motor Corp. v. Citizens Bank, 216 Va. 568, 221 S.E.2d 784 (1976).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983, 986.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:391, 4:395-4:397 (Collection of documentary drafts).

CJS. 9 C.J.S., Banks and Banking § 417.

§ 75-4-504. Privilege of presenting bank to deal with goods; security interest for expenses.

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a), the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

SOURCES: Codes, 1942, § 41A:4-504; Laws, 1966, ch. 316, § 4-504; Laws, 1992, ch. 420, § 111, eff from and after January 1, 1993.

Cross References — Enforcement of unpaid seller's lien, see § 75-2-706.

Presenting bank's duties and obligations with respect to documents and goods, see § 75-4-503.

RESEARCH REFERENCES

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 845.

11 Am. Jur. 2d, Banks and Financial Institutions §§ 983-986.

6 Am. Jur. Pl & Pr Forms (Rev), Bank Deposits and Collections, Forms 4:398, 4:399 (Collection of documentary drafts).

18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 4-Bank Deposits and Collections, §§ 253:2381, 253:2382 (Privilege of presenting bank to deal with goods on dishonored documentary draft).

CHAPTER 4A

Uniform Commercial Code—Funds Transfers

Part 1. Subject Matter and Definitions 75-4A-101
Part 2. Issue and Acceptance of Payment Order 75-4A-201
Part 3. Execution of Sender's Payment Order by Receiving Bank 75-4A-301
Part 4. Payment 75-4A-401
Part 5. Miscellaneous Provisions 75-4A-501

Part 1.

Subject Matter and Definitions.

Sec.

75-4A-101. Short title.
75-4A-102. Subject matter.
75-4A-103. Payment order—Definitions.
75-4A-104. Funds transfer—Definitions.
75-4A-105. Other definitions.
75-4A-106. Time payment order is received.
75-4A-107. Federal reserve regulations and operating circulars.
75-4A-108. Relationship to Electronic Fund Transfer Act.

§ 75-4A-101. Short title.

This chapter may be cited as Uniform Commercial Code — Funds Transfers.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Comparable Laws from other States — Alabama: Code of Ala. § 7-4A-101 et seq.
Alaska: Alaska Stat. § 45.14.101 et seq.
Arizona: A.R.S. § 47-4A101 et seq.
Arkansas: A.C.A. § 4-4A-101 et seq.
California: Cal U Com Code § 11101 et seq.
Colorado: C.R.S. 4-4.5-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-4A-101 et seq.
Delaware: 6 Del. C. § 4A-101 et seq.
District of Columbia: D.C. Code § 28:4A-101 et seq.
Florida: Fla. Stat. § 670.101 et seq.
Georgia: O.C.G.A. § 11-4A-101 et seq.
Hawaii: HRS § 490:4A-101 et seq.
Idaho: Idaho Code § 28-4-601 et seq.
Illinois: 810 ILCS 5/4A-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-4.1-101 et seq.
Iowa: Iowa Code § 554.12101 et seq.
Kansas: K.S.A. § 84-4a-101 et seq.
Kentucky: KRS § 355.4A-101 et seq.
Louisiana: La. R.S. § 10:4A-101 et seq.
Maine: 11 M.R.S. § 4-1101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 4A-101 et seq.
Massachusetts: ALM GL ch. 106, § 4A-101 et seq.
Michigan: MCLS § 440.4601 et seq.

Minnesota: Minn. Stat. § 336.4A-101 et seq.
Missouri: § 400.4A-101 R.S.Mo. et seq.
Montana: 30-4A-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 4A-101 et seq.
Nevada: Nev. Rev. Stat. Ann. § 104A.4101 et seq.
New Hampshire: RSA 382-A:4A-101 et seq.
New Jersey: N.J. Stat. § 12A:4A-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-4A-101 et seq.
New York: NY CLS UCC § 4-A-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-4A-101 et seq.
North Dakota: N.D. Cent. Code, § 41-04.1-01 et seq.
Ohio: ORC Ann. 1304.51 et seq.
Oklahoma: 12A Okl. St. § 4A-101 et seq.
Oregon: ORS § 74A.1010 et seq.
Pennsylvania: 13 Pa.C.S. § 4A101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-4.1-101 et seq.
South Carolina: S.C. Code Ann. § 36-4A-101 et seq.
South Dakota: S.D. Codified Laws § 57A-4A-101 et seq.
Tennessee: Tenn. Code Ann. § 47-4A-101 et seq.
Texas: Tex. Bus. & Com. Code § 4A.101 et seq.
Utah: Utah Code Ann. § 70A-4a-101 et seq.
Vermont: 9A V.S.A. § 4A-101 et seq.
Virgin Islands: 11A V.I.C. § 4A-101 et seq.
Virginia: Va. Code Ann. § 8.4A-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.4A-101 et seq.
West Virginia: W. Va. Code § 46-4A-101 et seq.
Wisconsin: Wis. Stat. § 410.101 et seq.
Wyoming: Wyo. Stat. § 34.1-4A-101 et seq.

RESEARCH REFERENCES

ALR. Effect of Uniform Commercial Code Article 4A on Attachment, Garnishment, Forfeiture or Other Third-Party Process Against Funds Transfers. 66 A.L.R.6th 567.

§ 75-4A-102. Subject matter.

Except as otherwise provided in Section 75-4A-108, this chapter applies to funds transfers defined in Section 75-4A-104.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

RESEARCH REFERENCES

ALR. Effect of Uniform Commercial Code Article 4A on Attachment, Garnishment, Forfeiture or Other Third-Party Process Against Funds Transfers. 66 A.L.R.6th 567.

§ 75-4A-103. Payment order—Definitions.

(a) In this chapter:

(1) "Payment order" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause

another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) The instruction does not state a condition to payment to the beneficiary other than time of payment;

(ii) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender; and

(iii) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) "Beneficiary" means the person to be paid by the beneficiary's bank.

(3) "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) "Receiving bank" means the bank to which the sender's instruction is addressed.

(5) "Sender" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) is to make more than one payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definitions of this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-104. Funds transfer—Definitions.

In this chapter:

(a) "Funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order.

(b) "Intermediary bank" means a receiving bank other than the originator's bank or the beneficiary's bank.

(c) "Originator" means the sender of the first payment order in a funds transfer.

(d) "Originator's bank" means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this chapter to funds transfers defined in this section, see § 75-4A-102.

Definitions of this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-105. Other definitions.

(a) In this chapter:

(1) "Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this chapter.

(3) "Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) "Funds-transfer system" means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) [Reserved]

(7) "Prove" with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(b)(8)).

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Acceptance"	Section 75-4A-209
"Beneficiary"	Section 75-4A-103
"Beneficiary's bank"	Section 75-4A-103
"Executed"	Section 75-4A-301
"Execution date"	Section 75-4A-301
"Funds transfer"	Section 75-4A-104
"Funds-transfer system rule"	Section 75-4A-501
"Intermediary bank"	Section 75-4A-104
"Originator"	Section 75-4A-104
"Originator's bank"	Section 75-4A-104
"Payment by beneficiary's bank to beneficiary"	Section 75-4A-405
"Payment by originator to beneficiary"	Section 75-4A-406
"Payment by sender to	

receiving bank”	Section 75-4A-403
“Payment date”	Section 75-4A-401
“Payment order”	Section 75-4A-103
“Receiving bank”	Section 75-4A-103
“Security procedure”	Section 75-4A-201
“Sender”	Section 75-4A-103

(c) The following definitions in Title 75, Chapter 4, apply to this chapter:

“Clearinghouse”	Section 75-4-104
“Item”	Section 75-4-104
“Suspends payments”	Section 75-4-104

(d) In addition Title 75, Chapter 1, contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1991, ch. 316, § 1; Laws, 2010, ch. 506, § 34, eff from and after July 1, 2010.

§ 75-4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in Section 75-1-202. A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this chapter refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this chapter.

SOURCES: Laws, 1991, ch. 316, § 1; Laws, 2010, ch. 506, § 35, eff from and after July 1, 2010.

§ 75-4A-107. Federal reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the federal reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-108. Relationship to Electronic Fund Transfer Act.

(a) Except as set forth in subsection (b), this chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 USCS 1693 et seq.) as amended from time to time.

(b) This chapter applies to a funds transfer that is a "remittance transfer" as defined in Section 919(g)(2) and (3) of the Electronic Fund Transfer Act (15 USCS Section 1693o-1(g)(2) and (3)), unless the remittance transfer is an "electronic fund transfer" as defined in Section 903(7) of the Electronic Fund Transfer Act (15 USCS Section 1693A(7)).

(c) In a funds transfer to which this chapter applies, in the event of an inconsistency between an applicable provision of this chapter and an applicable provision of the Electronic Fund Transfer Act, the provision of the Electronic Fund Transfer Act governs to the extent of the inconsistency.

SOURCES: Laws, 1991, ch. 316, § 1; Laws, 2013, ch. 451, § 3, eff from and after July 1, 2013.

Cross References — Application of this chapter, except as otherwise provided in this section, see § 75-4A-102.

RESEARCH REFERENCES

Am Jur. 17 Am. Jur. 2d, Consumer and Borrower Protection §§ 315-328.

PART 2.

ISSUE AND ACCEPTANCE OF PAYMENT ORDER.

SEC.

75-4A-201. Security procedure.
75-4A-202. Authorized and verified payment orders.
75-4A-203. Unenforceability of certain verified payment orders.
75-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.
75-4A-205. Erroneous payment orders.
75-4A-206. Transmission of payment order through funds-transfer or other communication system.
75-4A-207. Misdescription of beneficiary.
75-4A-208. Misdescription of intermediary bank or beneficiary's bank.
75-4A-209. Acceptance of payment order.
75-4A-210. Rejection of payment order.
75-4A-211. Cancellation and amendment of payment order.
75-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

§ 75-4A-201. Security procedure.

"Security procedure" means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "Security procedure" defined in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-202. Authorized and verified payment orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term "sender" in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in Section 75-4A-203(a)(1), rights and obligations arising under this section or Section 75-4A-203 may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Unenforceability of certain verified payment orders, see § 75-4A-203.

Refund of payment, see § 75-4A-204.

§ 75-4A-203. Unenforceability of certain verified payment orders.

(a) If an accepted payment order is not, under Section 75-4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to Section 75-4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Refund of payment, see § 75-4A-204.

§ 75-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under Section 75-4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 75-4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in Section 75-1-302(b), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1; Laws, 2010, ch. 506, § 36, eff from and after July 1, 2010.

Cross References — Application of this section to requirement that receiving bank pay interest on amount refunded when sender pays order it was not obliged to pay, see § 75-4A-402.

JUDICIAL DECISIONS

1. Applicability.
2. Computation of interest.

1. Applicability.

Miss. Code Ann. § 75-4A-204 did not apply as the customer was unable to prove that the bank accepted a payment order from him that was not authorized; however, this was not the type of transmission error covered by Miss. Code Ann. § 75-4A-205 as neither the customer, nor anyone acting on his behalf, ever transmitted a duplicate payment order to the bank so as to bring the case within the provisions of § 75-4A-205. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

2. Computation of interest.

Although Miss. Code Ann. § 75-4A-204 was not applicable the computation of interest was the same for Miss. Code Ann. § 75-4A-304, which provided that the bank was not obligated to pay interest on any amount refundable to the sender under § 75-4A-402(d) for the period before the bank learns of the execution error; it did not state that only ninety-days' interest was allowed, and it was implicit that the interest would accrue until the date of refund. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

§ 75-4A-205. Erroneous payment orders.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to Section 75-4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

JUDICIAL DECISIONS

1. In general.

Miss. Code Ann. § 75-4A-204 did not apply as the customer was unable to prove that the bank accepted a payment order from him that was not authorized; however, this was not the type of transmission error covered by Miss. Code Ann. § 75-4A-205 as neither the customer, nor anyone acting on his behalf, ever transmitted a duplicate payment order to the bank so as to bring the case within the provisions of § 75-4A-205. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

The "discharge of value" rule of restitution, rather than the common law "mistake of fact" rule, governs an action to recover funds sent in error by a duplicate wire transfer. Credit Lyonnais New York Branch v. Koval, 745 So. 2d 837 (Miss. 1999).

§ 75-4A-206. Transmission of payment order through funds-transfer or other communication system.

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the federal reserve banks.

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Erroneous payment orders, see § 75-4A-205.

§ 75-4A-207. Misdescription of beneficiary.

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

§ 75-4A-208. Misdescription of intermediary bank or beneficiary's bank.

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate

the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in Section 75-4A-302(a)(1).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-209. Acceptance of payment order.

(a) Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) When the bank (i) pays the beneficiary as stated in Section 75-4A-405(a) or 75-4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) When the bank receives payment of the entire amount of the sender's order pursuant to Section 75-4A-403(a)(1) or 75-4A-403(a)(2); or

(3) The opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one (1) hour after that time, or (ii) one (1) hour after the opening of the next business day of the sender following the payment date if

that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to Section 75-4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "acceptance" in this section applicable to this chapter, see § 75-4A-105.

Liability based on acceptance arises only when acceptance occurs as stated in this section, see § 75-4A-212.

Obligations of receiving bank when it accepts payment order pursuant to this section, see § 75-4A-302.

§ 75-4A-210. Rejection of payment order.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 75-4A-211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-211. Cancellation and amendment of payment order.

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a), a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the

beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Right of bank to recover payment where originator's bank executes originator's payment order before execution date or pays beneficiary of originator's payment order before payment date and payment order is canceled pursuant to this section, see § 75-4A-209.

Obligation of bank to pay interest to sender from execution date to date order is canceled pursuant to this section when bank fails to execute payment order despite existence of sufficient funds, see § 75-4A-210.

Application of this section to obligation of beneficiary's bank to pay and give notice to beneficiary, see § 75-4A-404.

Application of this section to time and amount of payment by originator to beneficiary, see § 75-4A-406.

§ 75-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in Section 75-4A-209, and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

PART 3.

EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK.

Sec.	
75-4A-301.	Execution and execution date.
75-4A-302.	Obligations of receiving bank in execution of payment order.
75-4A-303.	Erroneous execution of payment order.
75-4A-304.	Duty of sender to report erroneously executed payment order.
75-4A-305.	Liability for late or improper execution or failure to execute payment order.

§ 75-4A-301. Execution and execution date.

(a) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definitions of "executed" and "execution date" in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-302. Obligations of receiving bank in execution of payment order.

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to Section 75-4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the origina-

tor's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Reliance on either name or number identifying different persons by receiving bank in executing sender's payment order as breach of obligation stated in this section, see § 75-4A-208.

Liability of receiving bank for late or improper execution or failure to execute payment order in breach of this section, see § 75-4A-305.

Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

§ 75-4A-303. Erroneous execution of payment order.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Section 75-4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under Section 75-4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Duty of sender to report erroneously executed payment orders, see § 75-4A-304.

Application of this section to obligation of sender to pay receiving bank, see § 75-4A-402.

JUDICIAL DECISIONS

1. Applicability.

Receiving bank executed the only payment order issued by the customer by transferring $ 747.50 from the customer's account into another customer's account at the oral request of the customer's agent, and thereafter, the bank's computer system, due to "an entry error" improperly duplicated that payment every month for over five years; the requirements of Miss. Code Ann. § 75-4A-402(c) were satisfied as the funds transfer was completed, and the bank was entitled to recover from the customer, the sender, the amount of his order. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

§ 75-4A-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in Section 75-4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under Section 75-4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of this section to requirement that receiving bank pay interest on amount refunded when sender pays order it was not obliged to pay, see § 75-4A-402.

JUDICIAL DECISIONS

1. In general.
2. Computation of interest.

1. In general.

Customer's failure to discover the bank's error prevented his recovering interest on the majority of the transfers; it did not make him liable to the bank for the bank's duplicate payments to the other customer. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

2. Computation of interest.

Although Miss. Code Ann. § 75-4A-204 was not applicable the computation of interest was the same for Miss. Code Ann. § 75-4A-304, which provided that the bank was not obligated to pay interest on any amount refundable to the sender under § 75-4A-402(d) for the period before the bank learns of the execution error; it did not state that only ninety-days' interest was allowed, and it was implicit that the interest would accrue until the date of refund. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

§ 75-4A-305. Liability for late or improper execution or failure to execute payment order.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of Section 75-4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of Section 75-4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

PART 4.

PAYMENT.

Sec.

75-4A-401. Payment date.

75-4A-402. Obligation of sender to pay receiving bank.

75-4A-403. Payment by sender to receiving bank.

75-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

75-4A-405. Payment by beneficiary's bank to beneficiary.

75-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

§ 75-4A-401. Payment date.

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "payment date" in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-402. Obligation of sender to pay receiving bank.

(a) This section is subject to Sections 75-4A-205 and 75-4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to Section 75-4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not obliged to pay. Except as provided in Sections 75-4A-204 and 75-4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in Section 75-4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Right of receiving bank to payment under this section when there is erroneous execution of payment order, see § 75-4A-303.

Bank not obligated to pay interest to sender under this section where sender fails to report erroneously executed payment order, see § 75-4A-304.

Payment of sender's obligation under this section to pay receiving bank, see § 75-4A-403.

Conditions under which obligation of sender to pay its payment order under this section excused, see § 75-4A-405.

JUDICIAL DECISIONS

2. Computation of interest.

Although Miss. Code Ann. § 75-4A-204 was not applicable the computation of interest was the same for Miss. Code Ann. § 75-4A-304, which provided that the bank was not obligated to pay interest on any amount refundable to the sender under § 75-4A-402(d) for the period before the bank learns of the execution error; it did not state that only ninety-days' interest was allowed, and it was implicit that the interest would accrue until the date of refund. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

§ 75-4A-403. Payment by sender to receiving bank.

(a) Payment of the sender's obligation under Section 75-4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a federal reserve bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under Section 75-4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one (1) bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under Section 75-4A-402(b) or 75-4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "payment by sender to receiving bank" in this section applicable to this chapter, see § 75-4A-105.

Time at which beneficiary's bank accepts payment order, see § 75-4A-209.

§ 75-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(a) Subject to Sections 75-4A-211(e), 75-4A-405(d), and 75-4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Payment by beneficiary's bank to beneficiary, see § 75-4A-405.

Originator subrogated to rights of beneficiary to receive payment from beneficiary's bank under this section if payment by originator does not result in discharge, see § 75-4A-406.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

§ 75-4A-405. Payment by beneficiary's bank to beneficiary.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under Section 75-4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under Section 75-4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under Section 75-4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under Section 75-4A-406, and (iv) subject to Section 75-4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under Section 75-4A-402(c) because the funds transfer has not been completed.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "payment by beneficiary's bank to beneficiary" in this section applicable to this chapter, see § 75-4A-105.

Time at which beneficiary's bank accepts payment order, see § 75-4A-209.

Application of this section to obligation of beneficiary's bank to pay and give notice to beneficiary, see § 75-4A-404.

Application of this section to time and amount of payment by originator to beneficiary, see § 75-4A-406.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

§ 75-4A-406. Payment by originator to beneficiary; discharge of underlying obligation.

(a) Subject to Sections 75-4A-211(e), 75-4A-405(d), and 75-4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under Section 75-4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "payment by originator to beneficiary" in this section applicable to this chapter, see § 75-4A-105.

Conditions under which no payment by originator of funds transfer to beneficiary occurs under this section, see § 75-4A-405.

PART 5.

MISCELLANEOUS PROVISIONS.

SEC.

75-4A-501. Variation by agreement and effect of funds-transfer system rule.
75-4A-502. Creditor process served on receiving bank; setoff by beneficiary's bank.
75-4A-503. Injunction or restraining order with respect to funds transfer.
75-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.
75-4A-505. Preclusion of objection to debit of customer's account.
75-4A-506. Rate of Interest.
75-4A-507. Choice of law.

§ 75-4A-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "Funds-transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this chapter, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in Sections 75-4A-404(c), 75-4A-405(d), and 75-4A-507(c).

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Definition of "funds-transfer system rule" in this section applicable to this chapter, see § 75-4A-105.

§ 75-4A-502. Creditor process served on receiving bank; set-off by beneficiary's bank.

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-503. Injunction or restraining order with respect to funds transfer.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-504. Order in which items and payment orders may be charged to account; order of withdrawals from account.

(a) If a receiving bank has received more than one (1) payment order of the sender or one or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-505. Preclusion of objection to debit of customer's account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one (1) year after the notification was received by the customer.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

JUDICIAL DECISIONS

1. In general.

Appellate court had no explanation from the trial judge as to his denial of reconsideration based on the statute of limitations, Miss. Code Ann. § 75-4A-505, the judgment was reversed and remanded to the trial court for consideration of the statute of limitations and the statute of repose, including all arguments as to waiver. Nat'l Bank of Commerce v. Shelton, 27 So. 3d 444 (Miss. Ct. App. 2009).

§ 75-4A-506. Rate of Interest.

(a) If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), the amount is calculated by multiplying the applicable federal funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable federal funds rate is the average of the federal funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by three hundred sixty (360). The federal funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

§ 75-4A-507. Choice of law.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) If a funds transfer is made by use of more than one (1) funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

SOURCES: Laws, 1991, ch. 316, § 1, eff from and after July 1, 1991.

Cross References — Application of governing law on funds transfers specified in this section over contrary agreement, see § 75-1-301.

Application of this section to funds-transfer system rule to govern rights and obligations of parties other than participation banks using system, see § 75-4A-501.

CHAPTER 5

Uniform Commercial Code—Revised Article 5. Letters of Credit

Editor's Note — Section 27 of Chapter 460, Laws of 1996, repealed the sections formerly codified as Uniform Commercial Code Article 5, Letters of Credit (Chapter 5 of Title 75), effective June 30, 1996. Sections 2 through 18 enacted a revised Uniform Commercial Code Revised Article 5, Letters of Credit, effective July 1, 1996.

The following tables of disposition list the provisions of UCC Article 5 as they existed prior to June 30, 1996, and the corresponding provisions in UCC Revised Article 5, effective July 1, 1996. These tables are intended to assist the user who is familiar with the former Article 5 in finding comparable new provisions in Revised Article 5.

Where appropriate, notes to judicial decisions have been moved from their location under former provisions to the comparable new provisions.

TABLE OF DISPOSITION OF SECTIONS IN FORMER ARTICLE 5

FORMER ARTICLE 5	REVISED ARTICLE 5
75-5-101	75-5-101
75-5-102	75-5-103
75-5-103	75-5-102
75-5-104	75-5-104
75-5-105	75-5-105
75-5-106	75-5-106
75-5-107(1)-(3)	75-5-107(a)-(c)
75-5-107(4)	Omitted
75-5-108	Omitted
75-5-109	75-5-108
75-5-110	Omitted
75-5-111	75-5-110
75-5-112(1)-(2)	75-5-108(b), (c), (h)
75-5-112(3)	75-5-102(a)(13)
75-5-113	Omitted
75-5-114(1)	75-5-108(a)
75-5-114(2)	75-5-109(a)
75-5-114(3)	75-5-108(i)
75-5-115	75-5-111
75-5-116	75-5-112, 75-5-114
75-5-117	Omitted

TABLE INDICATING SOURCES OR DERIVATIONS OF REVISED ARTICLE 5 SECTIONS

REVISED ARTICLE 5	FORMER ARTICLE 5
75-5-101	75-5-101
75-5-102	75-5-103
75-5-102(a)(13)	75-5-112(3)
75-5-103	75-5-102
75-5-104	75-5-104
75-5-105	75-5-105
75-5-106	75-5-106
75-5-107(a)-(c)	75-5-107(1)-(3)
75-5-108	75-5-109
75-5-108(a)	75-5-114(1)

REVISED ARTICLE 5	FORMER ARTICLE 5
75-5-108(b), (c), (h)	75-5-112(1)-(2)
75-5-108(i)	75-5-114(3)
75-5-109(a)	75-5-114(2)
75-5-110	75-5-111
75-5-111	75-5-115
75-5-112, 75-5-114	75-5-116

SEC.
75-5-101. Short title.
75-5-102. Definitions.
75-5-103. Scope.
75-5-104. Formal requirements.
75-5-105. Consideration.
75-5-106. Issuance, amendment, cancellation and duration.
75-5-107. Confirmer, nominated person and adviser.
75-5-108. Issuer's rights and obligations.
75-5-109. Fraud and forgery.
75-5-110. Warranties.
75-5-111. Remedies.
75-5-112. Transfer of letter of credit.
75-5-113. Transfer by operation of law.
75-5-114. Assignment of proceeds.
75-5-115. Statute of limitations.
75-5-116. Choice of law and forum.
75-5-117. Subrogation of issuer, applicant and nominated person.
75-5-118. Security interest of issuer or nominated person.

§ 75-5-101. Short title.

This chapter may be cited as Uniform Commercial Code—Revised Article 5. Letters of Credit.

SOURCES: Laws, 1996, ch. 460, § 2, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-101 [Codes, 1942, § 41A:5-101; Laws, 1966, ch. 316, § 5-101, eff March 31, 1968], which provided the short title for this chapter, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-101.

Laws of 1996, ch. 460, §§ 1, 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 1. The purpose of this act is to repeal the chapter of law known as the "Uniform Commercial Code—Letters of Credit" and to recodify replacement versions of that law under the same chapter number in the Mississippi Code of 1972, which provisions are to be known as the "Uniform Commercial Code—Revised Article 5. Letters of Credit.

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Definition and operation of acceptance, see § 75-3-409.
Definitions, see § 75-5-102.
Scope of chapter, see § 75-5-103.

Comparable Laws from other States — Alabama: Code of Ala. § 7-5-101 et seq
Alaska: Alaska Stat. § 45.05.101 et seq.
Arizona: A.R.S. § 47-5101 et seq.
Arkansas: A.C.A. § 4-5-101 et seq.
California: Cal U Com Code § 5101 et seq.
Colorado: C.R.S. 4-5-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-5-101 et seq.
Delaware: 6 Del. C. § 5-101 et seq.
District of Columbia: D.C. Code § 28:5-101 et seq.
Florida: Fla. Stat. § 675.101 et seq.
Georgia: O.C.G.A. § 11-5-101 et seq.
Hawaii: HRS § 490:5-101 et seq.
Idaho: Idaho Code § 28-5-101 et seq.
Illinois: 810 ILCS 5/5-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-5-101 et seq.
Iowa: Iowa Code § 554.5101 et seq.
Kansas: K.S.A. § 84-5-101 et seq.
Kentucky: KRS § 355.5-101 et seq.
Louisiana: La. R.S. § 10:5-101 et seq.
Maine: 11 M.R.S. § 5-1101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 5-101 et seq.
Massachusetts: ALM GL ch. 106, § 5-101 et seq.
Michigan: MCLS § 440.5101 et seq.
Minnesota: Minn. Stat. § 336.5-101 et seq.
Missouri: § 400.5-101 R.S.Mo. et seq.
Montana: 30-5-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 5-101 et seq.
Nevada: Nev. Rev. Stat. Ann. § 104.5101 et seq.
New Hampshire: RSA 382-A:5-101 et seq.
New Jersey: N.J. Stat. § 12A:5-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-5-101 et seq.
New York: NY CLS UCC § 5-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-5-101 et seq.
North Dakota: N.D. Cent. Code, § 41-05-01 et seq.
Ohio: ORC Ann. 1305.01 et seq.
Oklahoma: 12A Okl. St. § 5-101 et seq.
Oregon: ORS § 75.1010 et seq.
Pennsylvania: 13 Pa.C.S. § 5101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-5-101 et seq.
South Carolina: S.C. Code Ann. § 36-5-101 et seq.
South Dakota: S.D. Codified Laws § 57A-5-101 et seq.
Tennessee: Tenn. Code Ann. § 47-5-101 et seq.
Texas: Tex. Bus. & Com. Code § 5.101 et seq.
Utah: Utah Code Ann. § 70A-5-101 et seq.
Vermont: 9A V.S.A. § 5-101 et seq.
Virgin Islands: 11A V.I.C. § 5-101 et seq.
Virginia: Va. Code Ann. § 8.5A-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.5-101 et seq.
West Virginia: W. Va. Code § 46-5-101 et seq.
Wisconsin: Wis. Stat. § 405.101 et seq.
Wyoming: Wyo. Stat. § 34.1-5-101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-5-101.
6. In general.
7. Letters of credit.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-101.

6. In general.

When a supporting document stating that the goods conform is in harmony with the requirements of the letter of credit, the issuing bank is not required to go behind the supporting document to determine whether it is in fact sufficient. Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

The Article on letters of credit is to be liberally interpreted. The requirement of rigid adherence to material matters must strike a balance with the concept of reasonable flexibility as to minor matters in order to facilitate trade. Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

Documents supporting a letter of credit are to be strictly construed because international financing transactions rest upon the accuracy of documents rather than upon the condition of the goods they represent. Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

7. Letters of credit.

Trial court erred in confirming the special master's sale of property to a third-party bidder after rejecting the heir's high bid on the grounds that a letter of credit submitted by the heir was not the equivalent of cash because under the Uniform Commercial Code, Miss. Code Ann. §§ 75-5-101 to 75-5-118, the letter of credit was sufficient and the fourth heir's bid was the highest bid that satisfied the requirements set forth in the consent judgment in the other heirs' partition action. Therefore, the case was remanded for the trial court to set aside the sale. Hataway v. Estate of Nicholls, — So. 2d —, 2004 Miss. LEXIS 1328 (Miss. Oct. 28, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 1054, 2005 Miss. LEXIS 109, 56 U.C.C. Rep. Serv. 2d (CBC) 576 (Miss. 2005).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 1, 6.

CJS. 10 C.J.S., Bills and Notes §§ 165-169, 174, 202, 204.

Law Reviews. Czarnetzky, Symposium on the Uniform Commercial Code: Modernizing Commercial Financing Practices: The Revisions to Article 5 of the Mississippi UCC. 66 Miss. L. J. 325, Winter, 1996.

§ 75-5-102. Definitions.

(a) In this chapter:

(1) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed or amended.

(2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer

to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in Section 75-5-108(e), and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) "Good faith" means honesty in fact in the conduct or transaction concerned.

(8) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs:

(i) Upon payment;

(ii) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or

(iii) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family or household purposes.

(10) "Letter of credit" means a definite undertaking that satisfies the requirements of Section 75-5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate or otherwise give value under a letter of credit, and (ii) undertakes by agreement or custom and practice to reimburse.

(12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator and receiver.

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Accept" or "Acceptance" Section 3-409 [Section 75-3-409]

"Value" Sections 3-303, 4-211 [Sections 75-3-303, 75-4-211]

(c) Chapter 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1996, ch. 460, § 3, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-102 [Codes, 1942, § 41A:5-102; Laws, 1966, ch. 316, § 5-102, eff March 31, 1968], pertaining to the scope of this chapter, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. For present similar provisions, see § 75-5-103.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Supplementary general principles of law applicable, see § 75-1-103.

General definitions and principles of interpretation, see § 75-1-201 et seq.

Course of dealing and usage of trade, see § 75-1-303.

"Letter of credit," "banker's credit" and "confirmed credit" with reference to sales of goods, see § 75-2-325.

Scope of chapter, see § 75-5-103.

Issuance, amendment, cancellation and duration, see § 75-5-106.

Confirmers, nominated persons and advisers, see § 75-5-107.

Issuer's obligations, see § 75-5-108.

Definitions, see § 75-9-102.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-103.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-103.

6. In general.

A letter was not a "letter of credit" where it merely advised the president of a construction company that an association with which the company had entered into a construction agreement had applied to the Farmers Home Administration for a loan, that the application had been approved by the Farmers Home Administration and the lending bank subject to certain conditions, and that the bank had set aside a specified sum to be payable to the construction company and the association on funding of the loan by Farmers Home Administration. Hendry Constr. Co. v. Bank of Hattiesburg, 562 So. 2d 100 (Miss. 1990).

Failure of customer to give prior consent, as required by Florida UCC § 5-106, to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. Lewis State Bank v. Advance Mtg. Corp., 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978).

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank, and (2) bank contended that letter was not letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103, even though it did not expressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any "particular form of phrasing." First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978).

Letter in which bank issued its "irrevocable and unconditional commitment" to corporation to purchase corporation's promissory note from holder in due course at note's maturity date if such holder gave bank 60 days' written notice of holder's intention to sell note to bank, and in which bank agreed "with the drawers, endorsers, and bona fide holders that this credit will be duly honored on presentation" in amount not to exceed unpaid balance of principal and interest due on presentation, was letter of credit within meaning of UCC § 5-103 because (1) such letter complied with UCC § 5-102 by creating a credit that required "documentary demand for payment," and (2) presentation of note in issue, as required by bank's letter, was "documentary demand for payment" within meaning of UCC § 5-103. Bank of N.C. v. Rock Island Bank, 570 F.2d 202 (7th Cir. Ill. 1978), on remand, 471 F. Supp. 1301 (C.D. Ill. 1979), rev'd on other grounds, 630 F.2d 1243 (7th Cir. Ill. 1980).

Where payment under terms of a letter of credit depended on presentation of a "written notice" to the issuer, which notice was to be accompanied "by the original of the letter of credit" at the request of a specified person if required for a specified purpose, and where the requirement of a written notice from the beneficiary lacked any evidentiary purpose or significance and the credit was essentially a "clean" credit, such letter of credit did not require a "documentary draft" or "documentary demand for payment" within meaning of UCC § 5-103, since traditionally a document like that described in UCC § 5-103 consists of a paper that has evidentiary value of some fact. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

The essential characteristic of a letter of credit, which is defined in UCC § 5-103, is that it represents an affirmative undertaking by the bank to honor the beneficiary's draft or demand for payment if it complies with the terms of the credit. The credit is an assurance of payment in the context of a "paper" transaction. The undertaking of the issuing bank, although initiated at the request and for the account of its customer, usually in connection with the customer's contractual relationship with the beneficiary, is an independent primary and direct obligation of the bank to the beneficiary. The issuer's obligation to the beneficiary is completely independent of both the relationship between the issuer and its customer in regard to the letter of credit and the relationship between the customer and the beneficiary on the underlying transaction. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Under UCC § 5-103, a "notice of default" on the underlying obligation must be in writing. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a "standby letter of credit" where it (1) advised plaintiff of commitment by defendant to assume obligation arising from note signed by defendant's customer, and (2) agreed to honor that commitment six months after date of customer's note on notice that loan for which note was given had not been repaid. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank's agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

In action by beneficiary of letter of credit against issuer to recover sum due under letter, where evidence showed that beneficiary, on receipt of certified check for $40,000 from person procuring letter's issuance, had posted $40,000 bond to vacate lis pendens filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the $40,000 certified check to procurer of letter; and beneficiary had not made payment on real estate bond, since under UCC § 5-103, issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrence of liability under such bond; and (3) issuer's claim that beneficiary's release of collateral (the $40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. Travelers Indem. Co. v. Flushing Nat'l Bank, 90 Misc. 2d 964 (1977).

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer's claim that letter of credit was "standby" letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. Brummer v. Bankers Trust, 268 S.C. 21, 231 S.E.2d 298 (1977).

Bill of sale draft which was given in payment for cattle and which specifically provided that drawee-bank, at its option, could refuse to honor it unless bill of sale was properly filled out, was a "documentary draft" under UCC § 5-103, since instrument on its face specifically provided that condition of honor was bill of sale attached to draft as document of title to describe cattle; therefore, drawee-bank was not liable for failure to pay or return item or send notice of dishonor prior to its midnight deadline since under UCC § 5-112 it could defer honor until close of third banking day following receipt of document at which time presenter of draft consented to bank holding draft for future payment. Marfa Nat'l Bank v. Powell, 512 S.W.2d 356, 15 UCCRS 463 (Tex. Civ. App. 1974), ref. n.r.e (Dec. 4, 1974).

With regard to letter of credit issued by bank, existence of bank confirmation of non-bank credit is not precluded, and "confirming" bank is liable for credit extended in reliance on its letter, which credit customer was unable to satisfy because of insufficient funds. Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 339 F. Supp. 457 (N.D. Ga. 1972), aff'd, 481 F.2d 1224 (5th Cir. Ga. 1973), reh'g denied, 481

F.2d 1403 (5th Cir. Ga. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

The same general principles which apply to other contracts in writing govern letters of credit, and as between the beneficiary and the issuer of the letter of credit, if ambiguity exists, then in construing such letter it is necessary to take the words as strongly against the issuer as a reasonable reading will justify, and generally courts are to avoid a construction of a letter of credit which would place a serious restriction upon ordinary business methods. Fair Pavilions, Inc. v. First Nat'l City Bank, 24 A.D.2d 109 (1st Dep't 1965), motion withdrawn, 18 N.Y.2d 709, 274 N.Y.S.2d 146, 220 N.E.2d 794 (1966), rev'd on other grounds, 19 N.Y.2d 512, 281 N.Y.S.2d 23, 227 N.E.2d 839 (1967), motion denied, 19 N.Y.2d 898, 281 N.Y.S.2d 90, 227 N.E.2d 887 (1967).

RESEARCH REFERENCES

ALR. What is a letter of credit under UCC §§ 5-102, 5-103. 44 A.L.R.4th 172.

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 1, 2, 4, 6, 8, 17, 20.

Instructions to jury; "notation credit" defined; obligations of purchaser or payor under notation credit, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Form 5:26.

CJS. 10 C.J.S., Bills and Notes §§ 165-169, 202, 204.

§ 75-5-103. Scope.

(a) This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this chapter.

(c) With the exception of this subsection, subsections (a) and (d), Sections 75-5-102(a)(9) and (10), 75-5-106(d), and 75-5-114(d), and except to the extent prohibited in Sections 75-1-302 and 75-5-117(d), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

SOURCES: Laws, 1996, ch. 460, § 4; Laws, 2010, ch. 506, § 37, eff from and after July 1, 2010.

Editor's Note — A former § 75-5-103 [Codes, 1942, § 41A:5-103; Laws, 1966, ch. 316, § 5-103, eff March 31, 1968], which defined terms used in this chapter, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. Definitions are now found in § 75-5-102.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Purposes and rules of construction, see § 75-1-103.

Choice of law and forum, see § 75-5-116.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2.-10. [Reserved for future use.]

II. Under Former § 75-5-102.

11. In general; applicability.
12. Construing letter of credit.
13. Definitions.
14. Duty of issuer.
15. Termination.
16. Miscellaneous.

I. Under Current Law.

1. In general.

Where former owners of bankruptcy debtors obtained letters of credit to secure the debtors' obligations under a sale/lease-back agreement concerning the debtors' equipment with the lessor of the equipment, the owners were not precluded from entitlement to equitable subrogation of the debtors' rights against the lessor simply because Miss. Code Ann. § 75-5-117 did not expressly grant an applicant subrogation rights against a beneficiary; the statute explicitly placed the owners in the same position as if they were guarantors, and Miss. Code Ann. § 75-5-103 specifically recognized that the express inclusion of rights concerning letters of credit did not negate other rights which were not expressly addressed. B.C. Rogers Processors, Inc. v. CIT Group/Equip. Fin., Inc. (In re B.C. Rogers Poultry, Inc.), — Bankr. —, 2009 Bankr. LEXIS 3729 (Bankr. S.D. Miss. Nov. 16, 2009).

2.-10. [Reserved for future use.]

II. Under Former § 75-5-102.

11. In general; applicability.

In the traditional letter-of-credit situation wherein a credit is used to assure payment to the seller in a sale-of-goods transaction, the terms of the credit expressly require the seller-beneficiary to present documents, such as documents of title, as part of the seller-beneficiary's demand for payment. The presentation of such documents not only provides something of value to the bank, but also serves to facilitate the sale transaction by providing some evidence that the seller is performing its obligations on the underlying transaction. However, a letter of credit need not require a documentary draft or a documentary demand for payment. A bank, instead, may issue "clean" letters of credit and such letters, under UCC § 5-102, are within the coverage of UCC Article 5. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Short letter issued by bank, which was so written that a reasonable person against whom it was to operate should have noticed from its express language that it indisputably purported to be an irrevocable letter of credit, stated "conspicuously" within meaning of UCC § 5-102 that it was a letter of credit and thus subject to provisions of UCC Article 5. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Historically, the letter of credit was developed to facilitate the sale of goods between distant and unfamiliar buyers and sellers. It was an arrangement under which a bank, whose credit was acceptable to a seller, would at the instance of the buyer agree to pay drafts drawn on it by the seller, provided that certain documents, such as a bill of lading, accompanied the drafts. However, expansion in the use of the letter of credit was a natural development in commercial banking, and elasticity in its use was made possible by the broad concept expressed in UCC Article 5. As a result, the letter was readily adaptable to a new commercial banking practice that utilizes what is known as a "standby letter of credit." This usage of a letter of credit is akin to a guaranty, for the bank's sole function is to act as surety for its customer's failure to pay. The standby letter of credit remains a primary obligation that is triggered by the presentation of documentation as a precondition to payment. The bank which has issued the letter needs only to determine whether the document presented appears, on its face, to be in accordance with the terms and conditions of the credit. The bank's responsibility to honor the credit exists independently of the underlying obligation, even though such responsibility may be conditioned on notice of a breach of the underlying obligation. It is now well established that the issuance of a "standby letter of credit" is a legitimate use by a bank of its credit and not an unauthorized excursion into the business of suretyship. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a "standby letter of credit" where it (1) advised plaintiff of commitment by defendant to assume obligation arising from note signed by defendant's customer, and (2) agreed to honor that commitment six months after date of customer's note on notice that loan for which note was given had not been repaid. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank's agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

Under UCC § 5-102, UCC Article 5 applied to "clean" letter of credit (letter requiring beneficiary to present draft and no other documents) where letter conspicuously stated that it was letter of credit. Baker v. National Blvd. Bank, 399 F. Supp. 1021 (N.D. Ill. 1975).

12. Construing letter of credit.

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank, and (2) bank contended that letter was not letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103, even though it did not expressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any "particular form of phrasing." First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978).

Short letter issued by bank, which was so written that a reasonable person against whom it was to operate should have noticed from its express language that it indisputably purported to be an irrevocable letter of credit, stated "conspicuously" within meaning of UCC § 5-102 that it was a letter of credit and thus subject to provisions of UCC Article 5. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Where letter of credit issued by bank provided that all funds under the credit were available to the beneficiary on presentation to the issuer of "written notice" and "the original letter of credit," and where such letter of credit in no way indicated that any documentation in addition to the "written notice" was required to establish that the funds available under the credit were being requested by the beneficiary for the purpose specified, such letter operated as an assurance that the beneficiary would receive payment on a money obligation already owed to it. Accordingly, since the credit was not conditioned on the presentation of any "documents," the issuer's dishonor of the beneficiary's demand for payment, which complied with the terms of the credit, was wrongful. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

The same general principles which apply to other contracts in writing govern letters of credit, and as between the beneficiary and the issuer of the letter of credit, if ambiguity exists, then in construing such a letter it is necessary to take the words as strongly against the issuer as a reasonable reading will justify. Fair Pavilions, Inc. v. First Nat'l City Bank, 24 A.D.2d 109 (1st Dep't 1965), motion withdrawn, 18 N.Y.2d 709, 274 N.Y.S.2d 146, 220 N.E.2d 794 (1966), rev'd on other grounds, 19 N.Y.2d 512, 281 N.Y.S.2d 23, 227 N.E.2d 839 (1967), motion denied, 19 N.Y.2d 898, 281 N.Y.S.2d 90, 227 N.E.2d 887 (1967).

13. Definitions.

A letter was not a "letter of credit" where it merely advised the president of a construction company that an association with which the company had entered into a construction agreement had applied to the Farmers Home Administration for a loan, that the application had been approved by the Farmers Home Administration and the lending bank subject to certain conditions, and that the bank had set aside a specified sum to be payable to the construction company and the association on funding of the loan by Farmers Home Administration. Hendry Constr. Co. v. Bank of Hattiesburg, 562 So. 2d 100 (Miss. 1990).

Letter in which bank issued its "irrevocable and unconditional commitment" to corporation to purchase corporation's promissory note from holder in due course at note's maturity date if such holder gave bank 60 days' written notice of holder's intention to sell note to bank, and in which bank agreed "with the drawers, endorsers, and bona fide holders that this credit will be duly honored on presentation" in amount not to exceed unpaid balance of principal and interest due on presentation, was letter of credit within meaning of UCC § 5-103 because (1) such letter complied with UCC § 5-102 by creating a credit that required "documentary demand for payment," and (2) presentation of note in issue, as required by bank's letter, was "documentary demand for payment" within meaning of UCC § 5-103. Bank of N.C. v. Rock Island Bank, 570 F.2d 202 (7th Cir. Ill. 1978), on remand, 471 F. Supp. 1301 (C.D. Ill. 1979), rev'd on other grounds, 630 F.2d 1243 (7th Cir. Ill. 1980).

UCC § 5-102 and § 5-103 make it clear that, generally, a bank's agreement to honor written demands for payment at the request of another on compliance with specified conditions constitutes a letter of credit. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer's claim that letter of credit was "standby" letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. Brummer v. Bankers Trust, 268 S.C. 21, 231 S.E.2d 298 (1977).

The fact that the UCC provides a definition for a confirming bank with regard to a letter of credit issued by a bank does not preclude the existence of a bank confirmation of a non-bank credit. Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 339 F. Supp. 457 (N.D. Ga. 1972), aff'd, 481 F.2d 1224 (5th Cir. Ga. 1973), reh'g denied, 481 F.2d 1403 (5th Cir. Ga. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

14. Duty of issuer.

Where letter of credit issued by bank provided that all funds under the credit were available to the beneficiary on presentation to the issuer of "written notice" and "the original letter of credit," and where such letter of credit in no way indicated that any documentation in addition to the "written notice" was required to establish that the funds available under the credit were being requested by the beneficiary for the purpose specified, such letter operated as an assurance that the beneficiary would receive payment on a money obligation already owed to it. Accordingly, since the credit was not conditioned on the presentation of any "documents," the issuer's dishonor of the beneficiary's demand for payment, which complied with the terms of the credit, was wrongful. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

Under UCC § 5-102 and § 5-103, letter delivered by defendant bank to plaintiff bank fulfilled all requirements of a "standby letter of credit" where it (1) advised plaintiff of commitment by defendant to assume obligation arising from note signed by defendant's customer, and (2) agreed to honor that commitment six months after date of customer's note on notice that loan for which note was given had not been repaid. New Jersey Bank v. Palladino, 77 N.J. 33, 389 A.2d 454 (1978).

The duty of an issuer goes no further than to verify that required documents conform to the letter of credit. Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

15. Termination.

When a letter of credit is to terminate upon the submission to the issuer of an affidavit stating the occurrence of any one of certain specified events the letter is terminated and the issuer does not have the burden of determining whether the affidavit is correct. Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

When a letter of credit is to terminate upon the submission of an affidavit that one or more specified events have occurred the affidavit must specify what event has occurred and it is insufficient that the affidavit state "one or more of the events described...have occurred." Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

16. Miscellaneous.

President of corporation opening line of credit with bank waived receipt of documents required by terms of line of credit when he agreed to pay on note without receiving document and failed to demand documents in writing after receiving telex informing him of third party's default. International Leather Distribs., Inc. v. Chase Manhattan Bank, 464 F. Supp. 1197 (S.D.N.Y. 1979), aff'd, 607 F.2d 996 (2d Cir. N.Y. 1979).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 5, dealing with letters of credit. 35 A.L.R.3d 1404.

What is a letter of credit under UCC §§ 5-102, 5-103. 44 A.L.R.4th 172.

Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 38 Am. Jur. 2d, Guaranty § 1 et seq.

50 Am. Jur. 2d, Letters of Credit §§ 1, 3, 4, 6, 8.

CJS. 10 C.J.S., Bills and Notes § 174.

38A C.J.S., Guaranty §§ 8, 9.

§ 75-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment or cancellation may be issued in any form that is a record and is authenticated (i) by a signature, or (ii) in accordance with the agreement of the parties or the standard practice referred to in Section 75-5-108(e).

SOURCES: Laws, 1996, ch. 460, § 5, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-104 [Codes, 1942, § 41A:5-104; Laws, 1966, ch. 316, § 5-104, eff March 31, 1968], pertaining to formal requirements for a credit, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-104.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Contracts that must be in writing, see § 15-3-1.

Supplementary general principles of law applicable, see § 75-1-103.

Modification, rescission, and waiver, see § 75-2-209.

Definition of "letter of credit," see § 75-5-102(a)(10).

Consideration, see § 75-5-105.

Choice of law and forum, see § 75-5-116.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-104.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-104.

6. In general.

Where (1) bank, by letter signed by its vice president, agreed to pay for furnishings and equipment to be purchased by bank's customer, identified seller of such equipment, and agreed to disburse funds to seller after customer had approved invoice for goods and presented it to bank, and (2) bank contended that letter was not letter of credit because (a) it did not contain a direct promise to pay, (b) it did not conspicuously state that it was a letter of credit, and (c) it did not require a documentary draft, court held (1) that letter was a letter of credit as defined by UCC § 5-103(1)(a), even though it did not expressly state that it was a letter of credit, since such statement is not absolutely essential under UCC § 5-102, (2) that invoice required by letter was a documentary draft within meaning of UCC § 5-103, and (3) that under UCC § 5-104, letter was not required to be drafted in any "particular form of phrasing." First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978).

Where, under New York UCC § 5-102, New York UCC Article 5 did not apply to letter of credit that was subject to Uniform Customs and Practice for Commercial Documentary Credits (UCP), silence of UCP on question of oral modification of irrevocable letter of credit required such modification to be governed by pre-UCC case law. W. Pat Crow Forgings, Inc. v. Moorings Aero Indus., Inc., 93 Misc. 2d 65 (1978).

RESEARCH REFERENCES

ALR. Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 50 Am. Jur. 2d, Letters of Credit § 11.

72 Am. Jur. 2d, Statute of Frauds § 143.

Formal requirements, 18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 5 — Letters of Credit, § 253:1400 et seq.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204.

§ 75-5-105. Consideration.

Consideration is not required to issue, amend, transfer or cancel a letter of credit, advice or confirmation.

SOURCES: Laws, 1996, ch. 460, § 6, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-105 [Codes, 1942, § 41A:5-105; Laws, 1966, ch. 316, § 5-105, eff March 31, 1968], pertaining to consideration, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-105.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Waiver or renunciation of claim or right after breach, without consideration, see § 75-1-107.

Letter of credit in contract for sale of goods, see § 75-2-325(3).

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-105.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-105.

6. In general.

It is not to be expected that a financial institution will engage its credit without some form of anticipated remuneration. It is also not to be expected that the beneficiary will know what the issuer's remuneration was, or whether in fact there was any identifiable remuneration in a given case. And since it would be extraordinarily difficult for the beneficiary to prove the issuer's remuneration, UCC § 5-105 (providing that no consideration is necessary to establish a credit) dispenses with such proof. First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978).

In action by beneficiary of letter of credit against issuer to recover sum due under letter, where evidence showed that beneficiary, on receipt of certified check for $40,000 from person procuring letter's issuance, had posted $40,000 bond to vacate lis pendens filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the $40,000 certified check to procurer of letter; and that under letter's terms, beneficiary by sight draft could draw full amount of credit specified in letter by certifying that beneficiary had incurred liability in connection with bond posted in the real estate action, (1) issuer of letter could not claim that there was no consideration for its issuance, since UCC § 5-105 provides that consideration is not necessary; (2) issuer also could not defend liability on ground that beneficiary had not made payment on real estate bond, since under UCC § 5-103, issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrence of liability under such bond; and (3) issuer's claim that beneficiary's release of collateral (the $40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. Travelers Indem. Co. v. Flushing Nat'l Bank, 90 Misc. 2d 964 (1977).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit § 12.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204.

§ 75-5-106. Issuance, amendment, cancellation and duration.

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one (1) year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five (5) years after its stated date of issuance, or if none is stated, after the date on which it is issued.

SOURCES: Laws, 1996, ch. 460, § 7, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-106 [Codes, 1942, § 41A:5-106; Laws, 1966, ch. 316, § 5-106, eff March 31, 1968], pertaining to the time and effect of the establishment of credit, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-106.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Letter of credit in contract for sale of goods, see § 75-2-325(3).

Scope of chapter, see § 75-5-103.

Absence of necessity for consideration in modifying terms of credit, see § 75-5-105.

Obligation of adviser, nominating person, and confirmer, see § 75-5-107.

Right of issuer to reimbursement for payment made under credit, see § 75-5-108.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-106.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-106.

6. In general.

Where (1) bank issued letter of credit to provide equipment lessor with security for lease of equipment to bank's customer, (2) bank, before issuing such letter, required that it be guaranteed by defendant and one other guarantor, (3) after issuance of letter of credit, defendant guarantor claimed that he, by a personal letter to bank, had expressly modified his unconditional guaranty of the letter of credit, and (4) bank refused to honor draft against letter of credit because of guarantors' failure to reimburse bank for full amount of draft, court held (1) that under UCC § 5-106, dealing with effect of establishment of an irrevocable credit, bank became liable on letter of credit when it issued it to bank's customer, (2) that after letter had left bank's control and was established with regard to customer, bank was powerless to modify or revoke it without customer's consent, (3) that bank's inability to modify or revoke the letter without its customer's consent was detriment that constituted sufficient consideration to support defendant's guaranty contract, and (4) that jury did not commit error in determining that defendant guarantor's personal letter to bank did not modify his guaranty of letter of credit. Goodwin Bros. Leasing v. Citizens Bank, 587 F.2d 730 (5th Cir. Ga. 1979).

Failure of customer to give prior consent, as required by Florida UCC § 5-106, to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. Lewis State Bank v. Advance Mtg. Corp., 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978).

A release agreement between the beneficiary and the customer as to the underlying transaction does not affect the issuer's obligation on a letter of credit, unless the release agreement explicitly states that the beneficiary has consented to revocation of the credit. The issuing bank may assert the beneficiary's release of the customer as a defense only if the bank is in the position of a surety. The issuing bank, however, is not a surety or guarantor with regard to the customer's obligation. The bank engages its own credit in the first instance by guaranteeing payment when it issues a credit, and its obligation to the beneficiary is completely independent of the underlying transaction between the customer and the beneficiary. Since the issuer's obligation to the beneficiary is a primary and independent obligation, a release or cancellation of the underlying debt, by itself, will not affect the bank's obligation. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 26 U.C.C. Rep. Serv. 750, 2 A.L.R.4th 650 (Me. 1978) (applying UCC § 5-106 and holding, where release agreement between beneficiary and customer made no reference to any consent by beneficiary to revocation of letter of credit, that issuing bank was liable for wrongful dishonor of such credit and that beneficiary, under

UCC § 5-115, could recover face value thereof from issuer as damages).

RESEARCH REFERENCES

ALR. Modification, revocation, or reformation of letter of credit — modern cases. 13 A.L.R.5th 465.

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 13, 17, 20, 39, 50, 51.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204, 206, 208.

§ 75-5-107. Confirmer, nominated person and adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser who is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment or advice has the rights and obligations of an adviser under subsection (c). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment or advice received by the person who so notifies.

SOURCES: Laws, 1996, ch. 460, § 8, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-107 [Codes, 1942, § 41A:5-107; Laws, 1966, ch. 316, § 5-107, eff March 31, 1968], pertaining to advice of credit, confirmation of a credit and errors in statement of terms, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-107.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Issuer's obligation, see § 75-5-108.
Limitation on acceptances by banks, see § 81-5-89.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-5-107.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-107.

6. In general.

Advising bank in letter of credit transaction had no obligation beyond transmitting accurate information to beneficiaries of letter of credit. National Am. Corp. v. Federal Republic of Nig., 425 F. Supp. 1365 (S.D.N.Y. 1977).

Bank's letter to lender was confirmation of non-bank's letter of credit under rule that bank may confirm credit issued by non-bank, thus becoming primarily liable on credit. Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 481 F.2d 1224 (5th Cir. Ga. 1973), reh'g denied, 481 F.2d 1403 (5th Cir. Ga. 1973), cert. dismissed, 414 U.S. 1139, 94 S. Ct. 888, 39 L. Ed. 2d 96 (1974).

Bank was directly obligated as though it were issuer of letter of credit to extent of its confirmation thereof, where bank confirmed letter of credit in favor of vessel owner agent upon request of correspondent foreign bank; held, confirming bank had added its liability to that of issuing bank and had undertaken to honor underlying drafts. Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461 (2d Cir. N.Y. 1970).

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 3, 13, 39, 50, 51.

Rights and obligations of parties; advice of credit; confirmation; risks of transmission and translation or interpretation of message, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:1-5:5.

Advice and confirmation of credit; liability for error in statement of terms, 18A Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 5 — Letters of Credit, § 253:2461 et seq.

CJS. 10 C.J.S., Bills and Notes §§ 202, 204, 206, 208.

§ 75-5-108. Issuer's rights and obligations.

(a) Except as otherwise provided in Section 75-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 75-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) To honor;

(2) If the letter of credit provides for honor to be completed more than seven (7) business days after presentation, to accept a draft or incur a deferred obligation; or

(3) To give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) or to mention fraud, forgery or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Section 75-5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) The performance or nonperformance of the underlying contract, arrangement or transaction;

(2) An act or omission of others; or

(3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).

(g) If an undertaking constituting a letter of credit under Section 75-5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) Takes the documents free of claims of the beneficiary or presenter;

(3) Is precluded from asserting a right of recourse on a draft under Sections 75-3-414 and 75-3-415;

(4) Except as otherwise provided in Sections 75-5-110 and 75-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

SOURCES: Laws, 1996, ch. 460, § 9, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-108 [Codes, 1942, § 41A:5-108; Laws, 1966, ch. 316, § 5-108, eff March 31, 1968], pertaining to notation credit, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The provisions of former § 75-5-108 were omitted from Revised Article 5.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Varying provisions of this code by agreement, see § 75-1-302.

Usage of trade, see § 75-1-303.

Obligation of good faith, see § 75-1-304.

Formal requirements of letter of credit, see § 75-5-104.

Warranties on transfer and presentment of documentary draft or demand, see § 75-5-110.

Transfers of letters of credit, generally, see § 75-5-112.

Transfers of letters of credit by operation of law, see § 75-5-113.

Warranties on negotiation or transfer of document of title, see § 75-7-507.

JUDICIAL DECISIONS

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former § 75-5-109.

11. In general; conformity of documents to letter.
12. —Consulting principal upon nonconformity.
13. —Invoices.
14. —Proof of agent's authority.
15. —Revocability.
16. —Waiver of defects.
17. —Refusal to honor.

III. Under Former § 75-5-112.

18. In general.

IV. Under Former § 75-5-114.

19. In general.
20. Duty and authority of issuer.
21. —As to conformity of presenting documents.
22. Fraud.
23. Holder in due course.
24. Injunctions.
25. —For fraud.
26. Jurisdiction of courts.
27. Presumptions.
28. Waiver.
29. Other particular applications.

I. Under Current Law.

1.-10. [Reserved for future use.]

II. Under Former § 75-5-109.

11. In general; conformity of documents to letter.

Terms and conditions of letter of credit must be strictly adhered to; terms constitute agreement between purchaser and bank, and bank has no discretion to waive requirements. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

That bank's action in dishonoring draft for nonconforming documentation is or may have been motivated by desire to protect against its own imprudence in failing to obtain adequate security from customer does not bar bank from insisting on conforming documents; when documentation presented is inadequate, question of security is irrelevant. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

An issuing bank is required to pay or is exonerated from payment on a letter of credit according to whether the documents presented to it conform to what is required by the letter. Fair Pavilions, Inc.

v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

12. —Consulting principal upon nonconformity.

Where bank was justified in rejecting draft on basis of documents presented alone, because it was not clear that purported agent's authority to acknowledge principal's default as required by letter of credit was still in effect, bank did not violate its responsibilities under Uniform Customs and Practices for Documentary Credits, Article 8, by contacting principal to inquire about purported agent's authority. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. Banco Espanol de Credito v. State St. Bank & Trust Co., 266 F. Supp. 106 (D. Mass. 1967), rev'd on other grounds, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

13. —Invoices.

Documents tendered by beneficiary of letter of credit to issuer were not in conformity with terms of letter of credit where letter of credit dictated that each invoice express on its face that it covered 100 per cent acrylic yarn but where invoices described shipment as "Imported Acrylic Yarn"; fact that packing lists attached to invoices disclosed on their faces that packages contained "cartons marked:—100 per cent acrylic" did not cure defect in invoices. Courtaulds N. Am., Inc. v. North Carolina Nat'l Bank, 528 F.2d 802 (4th Cir. N.C. 1975).

Obvious fact that notation has been superimposed upon invoice to certify compliance with condition of letter of credit does not prevent invoice from being "regular on its face." Talbot v. Bank of Hendersonville, 495 S.W.2d 548 (Tenn. Ct. App. 1972).

14. —Proof of agent's authority.

Authorization letter stating that agent's power permitted him to sign contracts and to represent principal before official and private organizations of Venezuela said nothing from which bank could infer that agent possessed authority to make statement to principal's banker amounting to confession of liability authorizing payment on letter of credit of nearly a million dollars. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where terms of letter of credit forbade bank to pay without statement by purchaser acknowledging purchaser's default on contract for sale of goods, and only such acknowledgment submitted was executed by purported representative of purchaser, absence of documentary demonstration of purported representative's continuing authority permitted bank to conclude that he was not agent of purchaser and that terms of credit had not been satisfied. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

15. —Revocability.

Power neither stated to be irrevocable, nor coupled with interest, is revocable at will, and fact that purported agent had previously held power did not require bank to conclude that power remained in effect, for purposes of bank's obligation to honor letter of credit. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where irrevocable letter of credit provided for its termination or cancellation upon receipt by issuing bank of affidavit that one or more events enumerated in building contract had occurred, bank was not justified in refusing payment upon receipt of an affidavit which did not specify the event or events which had occurred. Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

16. —Waiver of defects.

Terms and conditions of letter of credit must be strictly adhered to; terms constitute agreement between purchaser and bank, and bank has no discretion to waive requirements. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. Banco Espanol de Credito v. State St. Bank & Trust Co., 266 F. Supp. 106 (D. Mass. 1967), rev'd on other grounds, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

17. —Refusal to honor.

President of corporation opening line of credit with bank waived receipt of documents required by terms of line of credit when he agreed to pay on note without receiving document and failed to demand documents in writing after receiving telex informing him of third party's default. International Leather Distribs., Inc. v. Chase Manhattan Bank, 464 F. Supp. 1197 (S.D.N.Y. 1979), aff'd, 607 F.2d 996 (2d Cir. N.Y. 1979).

Letter of credit arising out of unique contractual relationship whereby bank's customer was to furnish to bank statement amounting to confession of liability for breach of contract and authorization of payment of indemnity, was not conventional commercial instrument of trade and transportation; accordingly, bank was justified in refusing to honor credit without documentation establishing purported agent's authority to confess liability. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Bank was justified in refusing to honor letter of credit, where documents submitted by seller did not demonstrate on their face that they conformed to terms and conditions of credit, in that acknowledgment of buyer's default which had to be submitted by terms of credit was executed by person whose power of attorney was outdated by several months, and not shown by any document to be still in effect. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Where the inspection certificate with respect to goods purchased in and intended to be imported from a foreign country conformed in all significant respects to the requirements of the letters of credit, the issuing bank could not, under the provisions of this section, refuse to accept and pay drafts drawn on it against the letters. (It should be noted, however, that under the facts stated by the court, the importing company which purchased the letters of credit had issued a series of conflicting and ambiguous instructions to the agent designated to inspect the merchandise prior to the time the certificate of inspection was issued.) Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

III. Under Former § 75-5-112.

18. In general.

Bill of sale draft which was given in payment for cattle and which specifically provided that drawee-bank, at its option, could refuse to honor it unless bill of sale was properly filled out, was a "documentary draft" under UCC § 5-103, since instrument on its face specifically provided that condition of honor was bill of sale attached to draft as document of title to describe cattle; therefore, drawee-bank was not liable for failure to pay or return item or send notice of dishonor prior to its midnight deadline since under UCC § 5-112 it could defer honor until close of third banking day following receipt of document at which time presenter of draft consented to bank holding draft for future payment. Marfa Nat'l Bank v. Powell, 512 S.W.2d 356, 15 UCCRS 463 (Tex. Civ. App. 1974), ref. n.r.e (Dec. 4, 1974).

Because bank was bound by irrevocable letter of credit, and acceptance or dishonor could not affect rights of holder of draft, statutory provision for dishonor if not paid within 3 days was inapplicable to case in which bank held draft for nearly 6 weeks before payment. Talbot v. Bank of Hendersonville, 495 S.W.2d 548 (Tenn. Ct. App. 1972).

Bill of sale draft is documentary draft and thus expressly excluded from operation of Code § 4-302(a); because of this status, bank could defer honor of draft until close of third banking day following its receipt. Valenzuela v. Bank of America, 272 Cal. App. 2d 673, 6 UCCRS 712 (4th Dist. 1969).

IV. Under Former § 75-5-114.

19. In general.

Although a fourth heir's letter of guarantee from a bank complied with Miss. Code Ann. § 75-5-108, a special master at a partition sale was not required to accept the bid presented with the letter of guarantee because the letter of guarantee conditioned the payment of funds on the delivery of "clear title." As the special master had not been instructed to deliver the property with clear title by the chancery court, it could not satisfy the condition in the letter of guarantee and was not required to accept the bid. Hataway v. Estate of Nicholls, 893 So. 2d 1054 (Miss. 2005).

Instrument issued to construction lender as part payment of loan commitment fee was letter of credit as defined by UCC §§ 5-102 and 5-103 and when lender complied with terms of letter by its demand for payment, issuer incurred legal obligation to honor such demand under UCC § 5-114, notwithstanding issuer's claim that letter of credit was "standby" letter of credit and that reduction of amount of loan was material change in commitment contract of which it should have been apprised. Brummer v. Bankers Trust, 268 S.C. 21, 231 S.E.2d 298 (1977).

20. Duty and authority of issuer.

In suit by American company to enjoin American bank from making payments on two letters of credit to Iranian bank, American bank must honor foreign bank's demand for payment pursuant to UCC § 5-114 since letters of credit, as written, make bank's obligation to honor timely demand for payment unqualified even in view of international political development which hinder economic performance. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

Bank's refusal to honor letters of credit was justified where letters, by their express terms (see UCC § 5-114), had expired prior to presentation of the required documents. W. Pat Crow Forgings, Inc. v. Moorings Aero Indus., Inc., 93 Misc. 2d 65 (1978).

Under UCC § 5-114, bank issuing letter of credit deals in documents, not goods, and is not responsible for any breach of warranty or nonconformity of goods that is involved in the underlying sales contract. Thus, where draft or demand for payment against letter of credit is in good form, it must be honored by bank that issued such letter. Foreign Venture Ltd. Partnership v. Chemical Bank, 59 A.D.2d 352, 22 U.C.C. Rep. Serv. 1208 (1st Dep't 1977) (holding that partnership which procured bank's issuance of irrevocable letter of credit, but was not party to such letter, could not enjoin payment of draft presented against letter).

Under UCC § 5-114, issuing bank did not have authority to refuse to pay beneficiary of letter of credit on grounds that it feared that it would be unable to collect from its customer. Baker v. National Blvd. Bank, 399 F. Supp. 1021 (N.D. Ill. 1975).

Mutual release between seller and buyer of sugar did not affect bank's obligation on letter of credit in absence of seller's consent to revocation of letter; held, bank's compliance with judgment on letter of credit would not amount to double payment to seller even though seller had settled with buyer. Asociacion de Azucareros de Guatemala v. United States Nat'l Bank, 423 F.2d 638 (9th Cir. Or. 1970).

21. —As to conformity of presenting documents.

Terms and conditions of letter of credit must be strictly adhered to; terms constitute agreement between purchaser and bank, and bank has no discretion to waive requirements. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp.

88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

That bank's action in dishonoring draft for nonconforming documentation is or may have been motivated by desire to protect against its own imprudence in failing to obtain adequate security from customer does not bar bank from insisting on conforming documents; when documentation presented is inadequate, question of security is irrelevant. Corporacion de Mercadeo Agricola v. Mellon Bank Int'l, 464 F. Supp. 88 (S.D.N.Y. 1978), aff'd, 608 F.2d 43 (2d Cir. N.Y. 1979).

Under UCC § 5-114, if demand for payment by beneficiary of letter of credit conforms to terms of such letter, bank issuing letter is obligated to pay, irrespective of any nonconformity in goods shipped and irrespective of most defenses that bank's customer could separately raise against beneficiary. But since Uniform Commercial Code does not specify whether beneficiary should strictly comply with terms of letter of credit or whether substantial performance would suffice, district court would conclude, in action by foreign beneficiary against issuing bank for dishonor of draft presented by beneficiary for payment, that Ohio court would adopt New York rule requiring strict compliance by beneficiary. Thus, since plaintiff foreign beneficiary (seller of goods) did not strictly comply with requirement in letter of credit that original purchase order must be signed by President of domestic corporation (buyer) which procured issuance of such letter of credit in favor of plaintiff, defendant issuing bank was not required to honor plaintiff's draft when it was presented for payment. Far E. Textile, Ltd. v. City Nat'l Bank & Trust Co., 430 F. Supp. 193 (S.D. Ohio 1977).

Issuing bank was not liable to its customer on ground that it made payment against letter of credit without obtaining proper export license as required by credit agreement, where documents produced with draft drawn on credit appeared on their face to comply with terms of letter of credit. Philip A. Feinberg, Inc. v. Varig, S.A., 80 Misc. 2d 305 (1974), aff'd, 47 A.D.2d 1005, 370 N.Y.S.2d 499 (1st Dep't 1975).

Issuing bank properly honored irrevocable letter of credit, thereby complying with terms of UCC § 5-114, despite fact that its customer was engaged in dispute with payee-beneficiary of letter over underlying contract of sale, and bank had knowledge of his dispute, where conditions of letter of credit had been fulfilled and where no injunction existed to restrain bank from releasing funds. Harvey Estes Constr. Co. v. Dry Dock Sav. Bank, 381 F. Supp. 271 (W.D. Okla. 1974).

Where the inspection certificate with respect to goods purchased in and intended to be imported from a foreign country conformed in all significant respects to the requirements of the letters of credit, the issuing bank could not, under the provisions of this section, refuse to accept and pay drafts drawn on it against the letters. (It should be noted, however, that under the facts stated by the court, the importing company which purchased the letters of credit had issued a series of conflicting and ambiguous instructions to the agent designated to inspect the merchandise prior to the time the certificate of inspection was issued.). Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

An issuing bank is required to pay or is exonerated from payment on a letter of credit according to whether the documents presented to it conform to what is required by the letter. Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

22. Fraud.

UCC § 5-114 authorizes court to enjoin payment on letter of credit if it finds fraud in transaction; court interprets "fraud" narrowly, and as general rule letters of credit are independent of underlying contract; call by Iranian bank for payment on letter of credit is fraudulent where underlying contract was cancelled on basis of force majeure provisions and where contract specifically provided that upon such cancellation bank guarantees of good performance would be immediately released. Itek Corp. v. First Nat'l Bank, 730 F.2d 19 (1st Cir. Mass. 1984).

Where issuer in drafting letter of credit requested that beneficiary produce written statement to effect that beneficiary was entitled to draw on letter of credit and where beneficiary submitted to issuer affidavit explicitly stating its entitlement to draw on letter, beneficiary more than complied with terms of letter, and issuer was required to honor draft drawn on letter, notwithstanding issuer's claim that beneficiary fraudulently "called" letter in that purpose for which beneficiary sought to have it honored was not purpose contemplated by parties to underlying contract. Bossier Bank & Trust Co. v. Union Planters Nat'l Bank, 550 F.2d 1077 (6th Cir. Tenn. 1977).

Unless there is fraud in the transaction, drawee bank has right to honor draft drawn against letters of credit which are in good form. Foreign Venture Ltd. Partnership v. Chemical Bank, 59 A.D.2d 352 (1st Dep't 1977).

Bank which issued letters of credit at request of mortgagor-customer in favor of plaintiff-mortgagee, pursuant to requirement of federal Department of Housing and Urban Development that mortgagor-borrowers must obtain letters of credit to cover final closing costs on completion of housing project, could not successfully claim that there was fraud in the transaction within meaning of UCC § 5-114 that justified bank's dishonoring of plaintiff's sight drafts where (1) letters of credit in suit were absolute on their face, (2) plaintiff's drafts were drawn in accordance with terms of such letters, (3) defendant's allegation of fraud in the transaction was based on claim that failure of mortgagor's housing project had rendered purpose of letters of credit (i.e., covering of final closing costs) impossible, and (4) plaintiff's presentation of drafts to bank was mandated by federal law governing underlying transaction between the parties. Mid-States Mtg. Corp. v. National Bank, 77 Mich. App. 651, 259 N.W.2d 175 (1977).

In suit under UCC § 5-114 to enjoin honoring, on ground of fraud not apparent on face of documents in suit, sight draft presented to defendant bank by defendant beneficiary against letter of credit issued by bank at plaintiff's request, test for granting injunctive relief, which was whether plaintiff had shown fraud not apparent on face of documents in suit, was not met where only fraud alleged by plaintiff was so-called "equitable fraud" of beneficiary in seeking payment under letter of credit after effecting, allegedly in bad faith, rejection of bank loan that plaintiff needed for construction venture and thereby causing conditions precedent for payment of draft under letter of credit to come into existence. In such case, to accept plaintiff's definition of "fraud" would make "fraud" synonymous with "breach of contract." Werner v. A.L. Grootemaat & Sons, 80 Wis. 2d 513, 259 N.W.2d 310, 23 U.C.C. Rep. Serv. 136 (1977) (also holding that plaintiff was not entitled to injunctive relief because it had adequate remedy at law for damages for honoring of sight draft in issue).

Correspondent bank which had presented for payment drafts, drawn pursuant to letters of credit issued by defendant, had satisfied burden of proving that correspondent bank had no notice of fraud in basic transaction which subjected order to be "as sample inspected in Spain"; court refused to infer notice of fraud from repetitive cables showing that buyer had not approved sample; held, it was not clearly erroneous for trial court to have found a want of any notice of fraud. Banco Espanol de Credito v. State St. Bank & Trust Co., 409 F.2d 711, 35 A.L.R.3d 1397 (1st Cir. Mass. 1969).

23. Holder in due course.

Where, despite cancellation of contract, buyer was informed that documents had been received by New York bank from Pakistani banks purporting to evidence shipment of boxing gloves under terms of cancelled contract, accompanied by drafts drawn against letter of credit, where inspection of shipments upon their arrival revealed that seller had shipped old, unpadded, ripped and mildewed gloves rather than new gloves to be manufactured as agreed upon, and buyer obtained preliminary injunction prohibiting New York bank from paying drafts, and where Pakistani banks brought action to obtain payment of drafts as holders in due course thereof: (1) although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer, constituted "fraud in the transaction" within meaning of UCC § 5-114, Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; (2) even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114, i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; (3) since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

24. Injunctions.

In suit by American company to enjoin American bank from making payments on two letters of credit to Iranian bank, American bank must honor foreign bank's demand for payment pursuant to UCC § 5-114 since letters of credit, as written, make bank's obligation to honor timely demand for payment unqualified even in view of international political development which hinder economic performance. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

Iranian bank will be enjoined from making payment on two bank guarantees obtained by American company in favor of "Imperial Government of Iran" without first notifying plaintiff company in writing of receipt of demand for payment and giving plaintiff 10 days in which to provide evidence as to lack of authenticity or fraudulent nature of demand since under present circumstances in Iran, there is serious risk that fraudulent or nonauthentic demand could be issued on guaranty since it is clear that Imperial Government has ceased to function and views of current government with respect to contract in question may be completely in conflict with former imperial government. Stromberg-Carlson Corp. v. Bank Melli Iran, 467 F. Supp. 530 (S.D.N.Y. 1979).

Under UCC § 5-114, where issuer of letters of credit, because of commencement of lawsuit, received notice of its customers' allegations of false certification prior to time payment was made on drafts and where party presenting drafts for payment was not holder in due course, trial court had discretion to grant temporary injunctive relief against honor of drafts and, since customers would be irreparably injured if injunctive relief was not granted, trial court should issue temporary injuction pending trial on merits. Shaffer v. Brooklyn Park Garden Apts., 311 Minn. 452, 250 N.W.2d 172 (1977).

Where, despite cancellation of contract, buyer was informed that documents had been received by New York bank from Pakistani banks purporting to evidence shipment of boxing gloves under terms of cancelled contract, accompanied by drafts drawn against letter of credit, where inspection of shipments upon their arrival revealed that seller had shipped old, unpadded, ripped and mildewed gloves rather than new gloves to be manufactured as agreed upon, and buyer obtained preliminary injunction prohibiting New York bank from paying drafts, and where Pakistani banks brought action to obtain payment of drafts as holders in due course thereof: (1) although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by

buyer, constituted "fraud in the transaction" within meaning of UCC § 5-114, Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; (2) even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114, i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; (3) since defense

of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. United Bank, Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

In action by lessee of Swiss hotel to enjoin bank from honoring lessor's draft under letter of credit issued pursuant to terms of lease agreement, lessee was not entitled to enjoin honor under UCC § 5-114 on basis that there was "fraud…not apparent on the face of the documents" where lessee failed to establish that lessor had no bona fide claim to payment or that documents presented to bank had absolutely no basis in fact, irrespective of lessor's actual entitlement to payment under lease. Intraworld Indus., Inc. v. Girard Trust Bank, 461 Pa. 343, 336 A.2d 316 (1975).

Issuing bank properly honored irrevocable letter of credit, thereby complying with terms of UCC § 5-114, despite fact that its customer was engaged in dispute with payee-beneficiary of letter over underlying contract of sale, and bank had knowledge of his dispute, where conditions of letter of credit had been fulfilled and where no injunction existed to restrain bank from releasing funds. Harvey Estes Constr. Co. v. Dry Dock Sav. Bank, 381 F. Supp. 271 (W.D. Okla. 1974).

25. —For fraud.

Bank issuing letter of credit may be enjoined against making payment upon demand under UCC § 5-114 where there is "fraud in transaction" and party presenting draft is beneficiary or some other party who is not holder in due course under UCC § 3-302. United Technologies Corp. v. Citibank, 469 F. Supp. 473 (S.D.N.Y. 1979).

In action under UCC § 5-114 by corporation procuring issuance of letter of credit to restrain issuing bank from making payment to letter's beneficiary because of beneficiary's alleged fraud, injunction could not be issued under UCC § 4-303(1)(d) where before temporary restraining order was served on issuing bank, it had determined that beneficiary had complied with terms of letter, had honored letter by mailing check to beneficiary, and had completed process of posting such check to plaintiff's account. Tranarg, C.A. v. Banca Commerciale Italiana, 90 Misc. 2d 829 (1977).

Where letters of credit were to be payable to beneficiary upon beneficiary's certification that party procuring letters had failed to carry out certain of its obligations under their agreement, procuring party would be entitled to permanent injunction restraining bank from honoring letter, if beneficiary's certificate was fraudulent. Dynamics Corp. of Am. v. Citizens & S. Nat'l Bank, 356 F. Supp. 991 (N.D. Ga. 1973).

26. Jurisdiction of courts.

Bankruptcy court did not have summary jurisdiction to enjoin payment of irrevocable letters of credit issued by bank on behalf of bankrupt nearly two years prior to filing of bankruptcy petition where letters were outstanding in hands of third persons and were not secured by property of bankrupt and where trustee had neither actual or constructive possession of money or documents. In re Marine Distributors, Inc., 522 F.2d 791, 18 UCCRS 183 (9th Cir. 1975).

27. Presumptions.

Under UCC there is strong presumption that holder of draft drawn under irrevocable letter of credit is owner of draft and is entitled to proceeds thereof, as long as there is compliance with terms of letter of credit. Lantz Int'l Corp. v. Industria Termotecnica Campana, S.p.A., 358 F. Supp. 510 (E.D. Pa. 1973).

28. Waiver.

In beneficiary's action for dishonor of draft presented pursuant to letter of credit, fact issue arose whether issuing bank, by authorizing supporting documents to be forwarded through time-consuming domestic collection process, waived condition of timeliness as to presentation of draft and documentation of customer's default on underlying obligation. Chase Manhattan Bank v. Equibank, 550 F.2d 882 (3d Cir. Pa. 1977).

Where the issuing bank is in doubt as to whether supporting documents conform to the requirements of the letter of credit, the bank may properly consult with its customer to determine whether the customer would waive any defects in the documents and it may, also, properly accept an indemnification agreement from the customer. Banco Espanol de Credito v. State St. Bank & Trust Co., 266 F. Supp. 106 (D. Mass. 1967), rev'd on other grounds, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

29. Other particular applications.

Iranian bank will be enjoined from making payment on two bank guarantees obtained by American company in favor of "Imperial Government of Iran" without first notifying plaintiff company in writing of receipt of demand for payment and giving plaintiff 10 days in which to provide evidence as to lack of authenticity or fraudulent nature of demand since under present circumstances in Iran, there is serious risk that fraudulent or nonauthentic demand could be issued on guaranty since it is clear that Imperial Government has ceased to function and views of current government with respect to contract in question may be completely in conflict with former imperial government. Stromberg-Carlson Corp. v. Bank Melli Iran, 467 F. Supp. 530 (S.D.N.Y. 1979).

It is error for a court to read the existence of certain conditions into a letter of credit on the basis of the underlying agreement between the beneficiary and the issuer's customer. The essence of a letter of credit is a promise by the issuer to pay money, and the key to the letter's uniqueness and vitality is that the promise of the issuer, under UCC § 5-114, is independent of any underlying contract. The beneficiary's noncompliance with the underlying contract does not affect the issuer's liability, unless a reference to the underlying contract explicitly creates a condition for honoring a draft. General references to underlying agreements are surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of a letter of credit. Pringle-Associated Mtg. Corp. v. Southern Nat'l Bank, 571 F.2d 871 (5th Cir. 1978).

Where irrevocable letter of credit provided that drafts on credit were to be accompanied by signed certifications that amount drawn was required to cover loan imbalance, where beneficiary submitted proper certification to that effect but demand for payment was not in compliance with credit inasmuch as no draft was presented, and where issuer refused payment solely on grounds that work had terminated on construction project and that certification was ambiguous, but raised no objection that call in beneficiary's demand while asserting other grounds precluded issuer from relying on this defense to beneficiary's suit to enforce payment against letter of credit. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

Where beneficiary of irrevocable letter of credit alleged that on day letter of credit expired issuing bank requested formal sight draft and letter evidencing customer's default, but agreed that these documents could be forwarded through domestic collections, though it was common knowledge in banking business that such delivery would entail delay of several days, and where issuing bank dishonored draft when it received it 10 days later because of late presentation of draft and documents, it could be found that issuing bank had modified terms of letter of credit and granted extension of time for presentation of required documents notwithstanding customer did not consent to such modification. Chase Manhattan Bank v. Equibank, 550 F.2d 882 (3d Cir. Pa. 1977).

In action by beneficiary of letter of credit against issuer to recover sum due under letter, where evidence showed that beneficiary, on receipt of certified check for $40,000 from person procuring letter's issuance, had posted $40,000 bond to vacate lis pendens filed against procurer in a real estate action; that beneficiary, on issuance of letter, had also released the $40,000 certified check to procurer of letter; and beneficiary had not made payment on real estate bond, since under UCC § 5-103(1)(a), issuer of letter of credit agrees to honor it on compliance with its conditions and only condition specified in letter in suit was certification by beneficiary of incurrence of liability under such bond; and (3) issuer's claim that beneficiary's release of collateral (the $40,000 certified check) without issuer's consent had discharged issuer's obligation as surety likewise could not be sustained because issuer of letter of credit, under UCC § 5-114, does not have status of surety or guarantor. Travelers Indem. Co. v. Flushing Nat'l Bank, 90 Misc. 2d 964 (1977).

RESEARCH REFERENCES

ALR. What constitutes compliance of documents presented with terms of letter of credit so as to require honor of draft under UCC § 5-114. 8 A.L.R.5th 463.

Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions § 983, 986; 50 Am. Jur. 2d, Letters of Credit §§ 22, 26.

Issuer's obligation to its customer, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:41-5:45.

Honor and dishonor; issuer's duty to honor, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:101-5:107.

Honor and dishonor; reimbursement of issuer, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:121, 5:122.

Honor and dishonor; wrongful dishonor; anticipatory repudiation, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit Forms, 5:133, 5:135.

CJS. 10 C.J.S., Bills and Notes §§ 203-206, 211.

§ 75-5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) A beneficiary, issuer or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) All of the conditions to entitle a person to the relief under the law of this state have been met; and

(4) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

SOURCES: Laws, 1996, ch. 460, § 10, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-109 [Codes, 1942, § 41A:5-109; Laws, 1966, ch. 316, § 5-109, eff March 31, 1968], pertaining to an issuer's obligation to its customer, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. For present similar provisions, see § 75-5-108.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Payment by buyer before inspection, see § 75-2-512.

Issuer's rights and obligations, see § 75-5-108.

Warranties, see § 75-5-110.

Transfers of letters of credit by operation of law, see § 75-5-113.

RESEARCH REFERENCES

ALR. What constitutes forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1)(2). 25 A.L.R.4th 239.

Am Jur. 10 Am. Jur. 2d, Banks and Financial Institutions § 20.

50 Am. Jur. 2d, Letters of Credit §§ 22, 26, 37, 38.

67A Am. Jur. 2d, Sales § 938-940, 942.

CJS. 10 C.J.S., Bills and Notes § 211.

§ 75-5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

(1) To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in Section 75-5-109(a); and

(2) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) are in addition to warranties arising under Chapters 3, 4, 7 and 8 because of the presentation or transfer of documents covered by any of those articles.

SOURCES: Laws, 1996, ch. 460, § 11, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-110 [Codes, 1942, § 41A:5-110; Laws, 1966, ch. 316, § 5-110, eff March 31, 1968], pertaining to availability of credit in portions and a presenter's reservation of a lien or claim, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The provisions of former § 75-5-110 were omitted from Revised Article 5.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Warranties on presentment and transfer of commercial paper, see § 75-3-417.

Warranties of customer and collecting bank on transfer or presentment of items, see § 75-4-207.

Issuer's rights and obligations, see § 75-5-108.

Warranties of person negotiating or transferring document of title, see § 75-7-507.

Warranties of collecting bank as to documents of title, see § 75-7-508.

Warranties on presentment and transfer of investment security, see § 75-8-306.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983-986; 50 Am. Jur. 2d, Letters of Credit § 23.

Warranties on transfer and presentment, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:71-5:73.

CJS. 10 C.J.S., Bills and Notes §§ 203, 204, 207, 209.

§ 75-5-111. Remedies.

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b).

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b) or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

SOURCES: Laws, 1996, ch. 460, § 12, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-111 [Codes, 1942, § 41A:5-111; Laws, 1966, ch. 316, § 5-111, eff March 31, 1968], pertaining to warranties on transfers and presentment, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. For present similar provisions, see § 75-5-110.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-115.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-115.

6. In general.

Under UCC § 5-115, any recovery of damages by the beneficiary of a letter of credit for the issuer's dishonor of the credit must be reduced by any amount that is realized by resale or other use or disposition of the subject matter of the transaction. In the sale-of-goods context that historically gave rise to the use of letters of credit, the documents that comprise the subject matter of the credit transaction between the issuing bank and the beneficiary often constitute something of significant value. In such circumstances, the beneficiary must either resell the documents, thus reducing his recovery of damages from the issuer, or turn them over to the issuer on payment of the judgment, thus giving the issuer something of value. However, in a case involving a "clean" guaranty letter of credit that deals only with a financial arrangement of pure credit, which is an area into which the use of letters of credit has recently expanded, the provision in UCC § 5-115 for "resale or other use or disposition of the subject matter of the transaction" does not apply to reduce the beneficiary's recovery of the face value of the credit, plus interest, as damages for the issuer's wrongful dishonor of the credit. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 2 A.L.R.4th 650 (Me. 1978).

A release agreement between the beneficiary and the customer as to the underlying transaction does not affect the issuer's obligation on a letter of credit, unless the release agreement explicitly states that the beneficiary has consented to revocation of the credit. The issuing bank may assert the beneficiary's release of the customer as a defense only if the bank is in the position of a surety. The issuing bank, however, is not a surety or guarantor with regard to the customer's obligation. The bank engages its own credit in the first instance by guaranteeing payment when it issues a credit, and its obligation to the beneficiary is completely independent of the underlying transaction between the customer and the beneficiary. Since the issuer's obligation to the beneficiary is a primary and independent obligation, a release or cancellation of the underlying debt, by itself, will not affect the bank's obligation. Housing Sec., Inc. v. Maine Nat'l Bank, 391 A.2d 311, 26 U.C.C. Rep. Serv. 750, 2 A.L.R.4th 650 (Me. 1978) (applying UCC § 5-106 and holding, where release agreement between beneficiary and customer made no reference to any consent by beneficiary to revocation of letter of credit, that issuing bank was liable for wrongful dishonor of such credit and that beneficiary, under UCC § 5-115(1) could recover face value thereof from issuer as damages).

In action by beneficiary against issuer to recover on irrevocable letter of credit issued in connection with construction loan agreement between beneficiary as lender and two individuals as borrowers, under UCC §§ 5-114 and 5-115 purported modification of loan contract occurring when individuals formed corporation to complete construction project was immaterial to issuer's liability to beneficiary since individuals, as customers designated in credit, remained original customers and formation of corporation affected only relationship between beneficiary and debtor; thus, evidence offered by issuer to prove intent of parties to loan contract or custom and usage regarding financing of project was properly excluded under UCC §§ 1-205(4) and 5-109. Dovenmuehle, Inc. v. East Bank, 38 Colo. App. 507, 563 P.2d 24 (1977), aff'd, 196 Colo. 422, 589 P.2d 1361 (1978).

Where (1) bank issued irrevocable letter of credit on application of bank's customer which specified that bank would honor drafts drawn by beneficiary on condition that such drafts be accompanied by beneficiary's signed statement that liquidated-damages deposit, provided for in underlying mortgage-loan transaction between beneficiary and bank's customer, was due beneficiary, and (2) where bank subsequently dishonored beneficiary's sight draft for amount of such deposit, which was accompanied by required signed statement of beneficiary, on ground that liquidated damages provision in underlying mortgage transaction was unenforceable penalty, bank was liable under UCC § 5-115 for face amount of draft and interest from date of dishonor, since underlying mortgage transaction between beneficiary and bank's customer was entirely separate from letter-of-credit arrangement between beneficiary and bank, and bank should have honored draft which complied with terms of letter-of-credit without questioning validity of provision in underlying mortgage transaction. New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co., 173 Conn. 492, 378 A.2d 562 (1977).

In action against insurer of irrevocable letter of credit which was dishonored on presentation, seeking damages including attorneys' fees, where no provision for attorneys' fees was found in letter of credit, UCC §§ 5-115 and 2-710 were not intended to afford vehicle for award of attorneys' fees either as costs or as "commercially reasonable charges, expenses or commissions." Florida Nat'l Bank v. Alfred & Ann Goldstein Found., Inc., 327 So. 2d 110 (Fla. App. 1976).

In action by Israeli partnership, as beneficiary of irrevocable letter of credit established by defendant Ugandan bank, defendant's instructions to its New York agent bank to refrain from effecting reimbursement of checks drawn under letter, which were communicated to agent before drafts drawn against letter were presented, and before expiration of letter, constituted anticipatory breach of contract, and defendant became liable for damages caused beneficiary. J. Zeevi & Sons v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 333 N.E.2d 168 (1975), cert. denied, 423 U.S. 866, 96 S. Ct. 126, 46 L. Ed. 2d 95 (1975).

Where irrevocable letter of credit provided for its termination or cancellation upon receipt by issuing bank of affidavit that one or more events enumerated in building contract had occurred, bank was not justified in refusing payment upon receipt of an affidavit which did not specify the event or events which had occurred. Fair Pavilions, Inc. v. First Nat'l City Bank, 19 N.Y.2d 512, 227 N.E.2d 839 (1967), reargument denied, 20 N.Y.2d 758 (1967).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983, 986.

15A Am. Jur. 2d, Commercial Code § 66.

50 Am. Jur. 2d, Letters of Credit § 23.

CJS. 10 C.J.S., Bills and Notes §§ 202, 211.

§ 75-5-112. Transfer of letter of credit.

(a) Except as otherwise provided in Section 75-5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) The transfer would violate applicable law; or

(2) The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in Section 75-5-108(e) or is otherwise reasonable under the circumstances.

SOURCES: Laws, 1996, ch. 460, § 13, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-112 [Codes, 1942, § 41A:5-112; Laws, 1966, ch. 316, § 5-112, eff March 31, 1968], pertaining to the time allowed for honor or rejection, withholding honor or rejection by consent and the definition of "presenter," was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. For present provisions similar to former § 75-5-112(1), (2), see § 75-5-108. For present provisions similar to former § 75-5-112(3), see § 75-5-102.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Assignment of rights under contract for sale of goods, see § 75-2-210.

Issuer's rights and obligations, see § 75-5-108.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-116.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-5-116.

6. In general.

Where irrevocable letter of credit was issued by bank at customer's request in favor of insurance company that subsequently went into liquidation, and where state insurance superintendent issued sight draft against such letter to obtain transfer of funds evidenced by letter for use in beneficiary's liquidation proceedings, fact that UCC § 5-116 provides that right to draw under a credit can be transferred or assigned only if the credit is expressly designated as transferrable or assignable, and further fact that letter of credit in issue was not so designated, did not prevent insurance superintendent from intervening in customer's suit to enjoin bank from honoring superintendent's sight draft, since UCC § 5-116 was intended to apply to letters of credit used to secure performance in commercial transactions involving manufacturer of goods and was not intended to apply to situation where, as in present case, letter of credit was used to secure deficits arising under profit-commission contract. Pastor v. National Republic Bank, 56 Ill. App. 3d 421, 371 N.E.2d 1127 (1st Dist. 1977), aff'd and remanded, 76 Ill. 2d 139, 28 Ill. Dec. 535, 390 N.E.2d 894 (1979).

RESEARCH REFERENCES

ALR. Who may enforce guaranty. 41 A.L.R.2d 1213.

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983-986.

11 Am. Jur. 2d, Bills and Notes §§ 307-309.

50 Am. Jur. 2d, Letters of Credit §§ 14, 16.

Transfer and assignment, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:152-5:154.

CJS. 10 C.J.S., Bills and Notes § 208.

§ 75-5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Section 75-5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in Section 75-5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 75-5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

SOURCES: Laws, 1996, ch. 460, § 14, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-113 [Codes, 1942, § 41A:5-113; Laws, 1966, ch. 316, § 5-113, eff March 31, 1968], pertaining to indemnities, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The provisions of former § 75-5-113 were omitted from Revised Article 5.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Transfers of letters of credit, generally, see § 75-5-112.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983, 986.

67A Am. Jur. 2d, Sales § 965-968.

CJS. 10 C.J.S., Bills and Notes § 208.

§ 75-5-114. Assignment of proceeds.

(a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Chapter 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Chapter 9 or other law.

SOURCES: Laws, 1996, ch. 460, § 15, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-114 [Codes, 1942, § 41A:5-114; Laws, 1966, ch. 316, § 5-114; 1990, ch. 384, § 46, eff from and after July 1, 1990], pertaining to assignment of proceeds of a letter of credit, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. For present provisions similar to former § 75-5-114(1), see § 75-5-109. For present provisions similar to former § 75-5-114(2), see § 75-5-109. For present provisions similar to former § 75-5-114(3), see § 75-5-108.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Liberal administration of remedies provided by this code, see § 75-1-305.

Anticipatory repudiation of contract for sale of goods, see § 75-2-610.

Retraction of anticipatory repudiation of contract for sale of goods, see § 75-2-611.

Remedies of seller, see § 75-2-702 et seq.

Seller's right to identify goods to contract notwithstanding breach or to salvage unfinished goods, see § 75-2-704.

Seller's stoppage of delivery in transit or otherwise see § 75-2-705.

Seller's resale including contract for resale, see § 75-2-706.

What constitutes, and rights of, person in position of seller of goods, see § 75-2-707.

Seller's incidental damages, see § 75-2-710.

Holder in due course of commercial paper, see § 75-3-302.

Scope of chapter, see § 75-5-103.

Modification or revocation of credit, see § 75-5-106.

Issuer's obligations, see § 75-5-108.

Transfer or assignment of right to draw under credit, see §§ 75-5-112, 75-5-113.

Manner of negotiating document of title, see § 75-7-501.

Bona fide purchaser of investment security, see § 75-8-302.

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 983, 986.

67A Am. Jur. 2d, Sales §§ 938-940, 942.

Wrongful dishonor; anticipatory repudiation, 6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:131-5:135.

§ 75-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this chapter must be commenced within one (1) year after the expiration date of the relevant letter of credit or one (1) year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

SOURCES: Laws, 1996, ch. 460, § 16, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-115 [Codes, 1942, § 41A:5-115; Laws, 1966, ch. 316, § 5-115, eff March 31, 1968], pertaining to the statute of limitations on actions to enforce rights or obligations arising under this chapter, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The section above is derived from former § 75-5-115.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

RESEARCH REFERENCES

Am Jur. 68A Am. Jur. 2d, Secured Transactions § 11.

CJS. 10 C.J.S., Bills and Notes §§ 208, 211.

§ 75-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 75-5-104 or by a provision in the person's letter of credit, confirmation or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) applies, the liability of an issuer, nominated person or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation or other undertaking is expressly made subject. If (i) this chapter would govern the liability of an issuer, nominated person or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 75-5-103(c).

(d) If there is conflict between this chapter and Chapters 3, 4, 4A or 9, this chapter governs.

(e) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

SOURCES: Laws, 1996, ch. 460, § 17, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-116 [Codes, 1942, § 41A:5-116; Laws, 1966, ch. 316, § 5-116; 1977, ch. 452, § 4, eff from and after April 1, 1978], pertaining to choice of law and forum, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. Present similar provisions are now found in §§ 75-5-112 and 75-5-114.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Territorial application of code and parties' power to choose applicable law, see § 75-1-301.

RESEARCH REFERENCES

Am Jur. 50 Am. Jur. 2d, Letters of Credit §§ 14, 16, 22, 34, 35.

68A Am. Jur. 2d, Secured Transactions §§ 14, 33-35, 453-457.

CJS. 10 C.J.S., Bills and Notes §§ 5, 9.

§ 75-5-117. Subrogation of issuer, applicant and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) The applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense or excuse.

SOURCES: Laws, 1996, ch. 460, § 18, eff from and after July 1, 1996.

Editor's Note — A former § 75-5-117 [Codes, 1942, § 41A:5-117; Laws, 1966, ch. 316, § 5-117, eff March 31, 1968], pertaining to subrogation of an issuer and applicant and nominated persons, was repealed by Laws of 1996, ch. 460, § 27, effective from and after June 30, 1996. The provisions of former § 75-5-117 were omitted from Revised Article 5.

Laws of 1996, ch. 460, §§ 28 and 29, effective July 1, 1996, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Scope of chapter see § 75-5-103.

Issuer's rights and obligations, see § 75-5-108.

JUDICIAL DECISIONS

1. Subrogation rights of applicant.

Where former owners of bankruptcy debtors obtained letters of credit to secure the debtors' obligations under a sale/leaseback agreement concerning the debtors' equipment with the lessor of the equipment, the owners were not precluded from entitlement to equitable subrogation of the debtors' rights against the lessor simply because Miss. Code Ann. § 75-5-117 did not expressly grant an applicant subrogation rights against a beneficiary; the statute explicitly placed the owners in the same position as if they were guarantors, and Miss. Code Ann. § 75-5-103 specifically recognized that the express inclusion of rights concerning letters of credit did not negate other rights which were not expressly addressed. B.C. Rogers Processors, Inc. v. CIT Group/Equip. Fin., Inc. (In re B.C. Rogers Poultry, Inc.), — Bankr. —, 2009 Bankr. LEXIS 3729 (Bankr. S.D. Miss. Nov. 16, 2009).

§ 75-5-118. Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9 of the Uniform Commercial Code, but:

(1) A security agreement is not necessary to make the security interest enforceable under Section 75-9-203(b)(3);

(2) If the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) If the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has

priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

SOURCES: Laws, 2001, ch. 495, § 3, eff from and after Jan. 1, 2002.

Cross References — General effectiveness of security agreement, see § 75-9-201.

CHAPTER 6

Uniform Commercial Code—Bulk Transfers

SEC.
75-6-101 through 75-6-111. Repealed.
75-6-112. Repeal of Sections 75-6-101 through 75-6-111.

§§ 75-6-101 through 75-6-111. Repealed.

Repealed by Laws, 1994, ch. 337, § 1, eff from and after July 1, 1995.

§ 75-6-101. [Codes, 1942, § 41A:6-101; Laws, 1966, ch. 316, § 6-101, eff March 31, 1968]

§ 75-6-102. [Codes, 1942, § 41A:6-102; Laws, 1966, ch. 316, § 6-102, eff March 31, 1968]

§ 75-6-103. [Codes, 1942, § 41A:6-103; Laws, 1966, ch. 316, § 6-103, eff March 31, 1968]

§ 75-6-104. [Codes, 1942, § 41A:6-104; Laws, 1966, ch. 316, § 6-104, eff March 31, 1968]

§ 75-6-105. [Codes, 1942, § 41A:6-105; Laws, 1966, ch. 316, § 6-105, eff March 31, 1968]

§ 75-6-106. [Codes, 1942, § 41A:6-106; Laws, 1966, ch. 316, § 6-106, eff March 31, 1968]

§ 75-6-107. [Codes, 1942, § 41A:6-107; Laws, 1966, ch. 316, § 6-107, eff March 31, 1968]

§ 75-6-108. [Codes, 1942, § 41A:6-108; Laws, 1966, ch. 316, § 6-108, eff March 31, 1968]

§ 75-6-109. [Codes, 1942, § 41A:6-109; Laws, 1966, ch. 316, § 6-109, eff March 31, 1968]

§ 75-6-110. [Codes, 1942, § 41A:6-110; Laws, 1966, ch. 316, § 6-110, eff March 31, 1968]

§ 75-6-111. [Codes, 1942, § 41A:6-111; Laws, 1966, ch. 316, § 6-111, eff March 31, 1968]

Editor's Note — Former §§ 75-6-101 to 75-6-111 provided for the regulation of bulk transfers.

§ 75-6-112. Repeal of Sections 75-6-101 through 75-6-111.

Section 75-6-101 through Section 75-6-111, Mississippi Code of 1972, shall stand repealed from and after July 1, 1995.

SOURCES: Laws, 1994, ch. 337, § 1, eff from and after passage (approved March 14, 1994).

CHAPTER 7

Uniform Commercial Code—Documents of Title

Part 1. General 75-7-101
Part 2. Warehouse Receipts: Special Provisions 75-7-201
Part 3. Bills of Lading: Special Provisions 75-7-301
Part 4. Warehouse Receipts and Bills of Lading: General Obligations 75-7-401
Part 5. Warehouse Receipts and Bills of Lading: Negotiation and Transfer 75-7-501
Part 6. Warehouse Receipts and Bills of Lading Miscellaneous Provisions 75-7-601
Part 7. Transitional Rules 75-7-701

PART 1.

GENERAL.

SEC.
75-7-101. Short title.
75-7-102. Definitions and index of definitions.
75-7-103. Relation of chapter to treaty, statute, tariff or regulation.
75-7-104. Negotiable and nonnegotiable bill of lading or other document of title.
75-7-105. Issuance of tangible document of title as substitute for electronic document; issuance of electronic document as substitute for tangible document.
75-7-106. Control of electronic document of title.

§ 75-7-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code—Documents of Title.

SOURCES: Codes, 1942, § 41A:7-101; Laws, 1966, ch. 316, § 7-101, eff March 31, 1968.

Cross References — General regulation of farm warehouses, see § 75-43-1 et seq.
Regulation of grain warehouses, see § 75-44-1 et seq.
Comparable Laws from other States — Alabama: Code of Ala. § 7-7-101 et seq
Alaska: Alaska Stat. § 45.07.111 et seq.
Arizona: A.R.S. § 47-7101 et seq.
Arkansas: A.C.A. § 4-7-101 et seq.
California: Cal U Com Code § 7101 et seq.
Colorado: C.R.S. 4-7-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-7-101 et seq.
Delaware: 6 Del. C. § 7-101 et seq.
District of Columbia: D.C. Code § 28:7-101 et seq.
Florida: Fla. Stat. § 677.1011 et seq.
Georgia: O.C.G.A. § 11-7-101 et seq.
Hawaii: HRS § 490:7-101 et seq.
Idaho: Idaho Code § 28-7-101 et seq.
Illinois: 810 ILCS 5/7-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-7-101 et seq.

Iowa: Iowa Code § 554.7101 et seq.
Kansas: K.S.A. § 84-7-101 et seq.
Kentucky: KRS § 355.7-101 et seq.
Louisiana: La. R.S. § 10:7-101 et seq.
Maine: 11 M.R.S. § 7-1101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 7-101 et seq.
Massachusetts: ALM GL ch. 106, § 7-101 et seq.
Michigan: MCLS § 440.7101 et seq.
Minnesota: Minn. Stat. § 336.7-101 et seq.
Missouri: § 400.7-101 R.S.Mo. et seq.
Montana: 30-7-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 7-101 et seq.
Nevada: Nev. Rev. Stat. Ann. § 104.7101 et seq.
New Hampshire: RSA 382-A:7-101 et seq.
New Jersey: N.J. Stat. § 12A:7-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-7-101 et seq.
New York: NY CLS UCC § 7-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-7-101 et seq.
North Dakota: N.D. Cent. Code, § 41-07-01 et seq.
Ohio: ORC Ann. 1307.01 et seq.
Oklahoma: 12A Okl. St. § 7-101 et seq.
Oregon: ORS § 77.1010 et seq.
Pennsylvania: 13 Pa.C.S. § 7101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-7-101 et seq.
South Carolina: S.C. Code Ann. § 36-7-101 et seq.
South Dakota: S.D. Codified Laws § 57A-7-101 et seq.
Tennessee: Tenn. Code Ann. § 47-7-101 et seq.
Texas: Tex. Bus. & Com. Code § 7.101 et seq.
Utah: Utah Code Ann. § 70A-7a-101 et seq.
Vermont: 9A V.S.A. § 7-101 et seq.
Virgin Islands: 11A V.I.C. § 7-101 et seq.
Virginia: Va. Code Ann. § 8.7-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.7-101 et seq.
West Virginia: W. Va. Code § 46-7-101 et seq.
Wisconsin: Wis. Stat. § 407.101 et seq.
Wyoming: Wyo. Stat. § 34.1-7-101 et seq.

JUDICIAL DECISIONS

1. In general.

Article 7 applies to intrastate shipments. G.A.C. Com. Corp. v. Wilson, 271 F. Supp. 242 (S.D.N.Y. 1967).

Interstate shipments are governed by the federal Bills of Lading Act. G.A.C. Com. Corp. v. Wilson, 271 F. Supp. 242 (S.D.N.Y. 1967).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 7, dealing with warehouse receipts, bills of lading, and other documents of title. 21 A.L.R.3d 1339.

Am Jur. 13 Am. Jur. 2d, Carriers § 307 et seq.

15A Am. Jur. 2d, Commercial Code §§ 34, 37, 39, 40.

67 Am. Jur. 2d, Sales § 371.

78 Am. Jur. 2d, Warehouses § 28 et seq.

CJS. 13 C.J.S., Carriers §§ 372-374, 379.

93 C.J.S., Warehousemen and Safe Depositaries § 35 et seq.

§ 75-7-102. Definitions and index of definitions.

(a) In this chapter, unless the context otherwise requires:

(1) "Bailee" means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(2) "Carrier" means a person that issues a bill of lading.

(3) "Consignee" means a person named in a bill of lading to which or to whose order the bill promises delivery.

(4) "Consignor" means a person named in a bill of lading as the person from which the goods have been received for shipment.

(5) "Delivery order" means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.

(6) [Reserved]

(7) "Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.

(8) "Issuer" means a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for which an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.

(9) "Person entitled under the document" means the holder, in the case of a negotiable document of title, or the person to which delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

(10) [Reserved]

(11) "Sign" means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic sound, symbol, or process.

(12) "Shipper" means a person that enters into a contract of transportation with a carrier.

(13) "Warehouse" means a person engaged in the business of storing goods for hire.

(b) Definitions in other chapters applying to this chapter and the sections in which they appear are:

(1) "Contract for sale," Section 75-2-106.

(2) "Lessee in the ordinary course of business," Section 75-2A-103.

(3) " 'Receipt' of goods," Section 75-2-103.

(c) In addition, Chapter 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:7-102; Laws, 1966, ch. 316, § 7-102; Laws, 2006, ch. 527, § 1; Laws, 2007, ch. 355, § 1; Laws, 2007, ch. 381, § 1; Laws, 2010, ch. 506, § 38, eff from and after July 1, 2010.

Joint Legislative Committee Note — Section 1 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 1 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 1 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For general definitions and principles of construction and interpretation applicable throughout this chapter, see § 75-1-201 et seq.

Liability for nonreceipt or misdescription, see §§ 75-7-203, 75-7-301.

For applicability to this section, of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Under the provisions of GL c 106, § 7-102(1)(h) the fact that a boat was stored by a marina out-of-doors rather than in a warehouse or similar structure does not mean that the bailee was not a "warehouseman" since, regardless of where he kept the boat, he was a person engaged in the business of storing goods for hire. Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc., 343 F. Supp. 347 (D. Mass. 1971).

Operator of garage and body shop, who at request of police officer towed plaintiff's automobile from scene of accident and refused to deliver vehicle to plaintiff unless towing and storage charges were paid, had no warehouseman's lien for such charges under UCC § 7-209(1), since mere garage keeper is not warehouseman within meaning of UCC § 7-102(1)(h). Candler v. Ash, 53 Ohio App. 2d 134, 372 N.E.2d 617 (1976) (noting, in holding operator liable for conversion of plaintiff's vehicle, that operator had not issued any warehouse receipt for vehicle).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers § 308, 339.

15A Am. Jur. 2d, Commercial Code § 35.

67 Am. Jur. 2d, Sales § 371.

78 Am. Jur. 2d, Warehouses §§ 2, 3, 29.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Forms 1:26-1:33 (definitions and principles of interpretation; instruction to jury).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:3, 7:7 (definitions).

CJS. 13 C.J.S., Carriers § 372, 373.

77A C.J.S., Sales §§ 1, 2, 5-9, 12-14.

93 C.J.S., Warehousemen and Safe Depositaries §§ 1-4.

§ 75-7-103. Relation of chapter to treaty, statute, tariff or regulation.

(a) This chapter is subject to any treaty or statute of the United States or regulatory statute of this state to the extent the treaty, statute, or regulatory statute is applicable.

(b) This chapter does not repeal or modify any law prescribing the form or contents of a document of title or the services or facilities to be afforded by a bailee, or otherwise regulating a bailee's businesses in respects not specifically treated in this chapter. However, violation of these laws does not affect the status of a document of title that otherwise complies with the definition of a document of title.

(c) This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 USCS Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 USCS Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 USCS Section 7003(b)).

(d) To the extent there is a conflict between the Uniform Electronic Transactions Act (Title 75, Chapter 12) and this chapter, this chapter governs.

SOURCES: Codes, 1942 § 41A:7-103; Laws, 1966, ch. 316, § 7-103; Laws, 2006, ch. 527, § 2; Laws, 2007, ch. 355, § 2; Laws, 2007, ch. 381, § 2, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 2 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 2 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 2 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Duty of care, contractual limitation of liability, see §§ 75-7-204, 75-7-309.

Storage under government bond, see § 75-7-201.

Form and terms of warehouse receipts, see § 75-7-202.

Termination of storage, see § 75-7-206.

Irregularities in issue of receipt or bill or conduct of issuer, see § 75-7-401.

Obligation to deliver; excuse, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Contention by plaintiff warehousemen that certain rules adopted by Arkansas Transportation Commission to govern household goods carriers violated Arkansas Uniform Commercial Code could not be sustained, since Arkansas UCC § 7-103 expressly made provisions of Arkansas UCC Article 7 subject to state's regulatory statutes and also to tariffs, classifications, or regulations that might be filed or issued under such statutes.

Household Goods Carriers v. Arkansas Transp. Comm'n, 262 Ark. 797, 562 S.W.2d 42 (1978) (observing that as result of Arkansas UCC § 7-103, no conflict existed between rules complained of and Arkansas UCC Article 7).

Fact that contract between shipper and time charterer stated that it was to be governed by New York law, and UCC § 7-309(2), as adopted in New York, allowed carrier to limit liability to value stated in bill of lading only when carrier's rates were dependent on value, did not affect time charterer's entitlement to damage limitation contained in Carriage of Goods by Sea Act in light of UCC § 7-103 making UCC subject to any treaty or statute of the United States. Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser, 507 F.2d 68 (2d Cir. N.Y. 1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975) (involving New York law).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 148-151, 156, 307.

15A Am. Jur. 2d, Commercial Code §§ 34, 37, 39, 40.

67 Am. Jur. 2d, Sales §§ 371, 372, 387, 388 et seq.

78 Am. Jur. 2d, Warehouses § 28 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:1 (complaint, petition, or declaration; allegation; bailee subject to statute or regulation).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:2 (answer; defense; transaction governed by administrative regulation).

CJS. 13 C.J.S., Carriers §§ 1-5, 17, 329, 333-347, 354, 372, 373.

§ 75-7-104. Negotiable and nonnegotiable bill of lading or other document of title.

(a) A document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) is nonnegotiable. A bill of lading that states that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable.

SOURCES: Codes, 1942, § 41A:7-104; Laws, 1966, ch. 316, § 7-104; Laws, 2006, ch. 527, § 3; Laws, 2007, ch. 355, § 3; Laws, 2007, ch. 381, § 3, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 3 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 3 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 3 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Rights acquired by due negotiation, see § 75-7-502.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

Negotiable farm warehouse receipts, see § 75-43-11.

JUDICIAL DECISIONS

1. In general.

Warehouse receipts providing that on return thereof one bale of cotton would be delivered to "above named depositor or its order, or bearer" were negotiable as bearer documents of title under UCC § 7-104(1)(a), as against contention that if both "order" language and "bearer" language appeared on face of such instruments they would be nonnegotiable, and such receipts were "duly negotiated" to holders thereof within meaning of UCC § 7-501(4) where no evidence was produced to show that holders had not paid value for receipts, or that transaction was not in regular course of business, or that holders had had actual notice of any claims to receipts or had not acted in good faith. R.E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

In action by cotton farmers to enjoin defendants from removing 1,640 bales of cotton from warehouse of one defendant, where evidence showed that plaintiffs had sold warehouse receipts representing such cotton to buyer who paid for receipts by subsequently dishonored checks, and that such buyer later sold receipts to defendants who were unaware that plaintiffs had not been paid therefor, temporary injunction issued by trial court would be dissolved for failure of plaintiffs to establish probable right of recovery, since such receipts were negotiable as bearer paper under UCC § 7-104(1)(a) and UCC § 7-501(2)(a) and had been duly negotiated to defendants in compliance with UCC § 7-501(4), so as to give defendants under UCC § 7-502(b) title to cotton represented by receipts. R.E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 5, 11, 12, 16.

13 Am. Jur. 2d, Carriers §§ 308, 338, 339.

15A Am. Jur. 2d, Commercial Code § 52 et seq.

67 Am. Jur. 2d, Sales §§ 371, 372, 387, 388 et seq.

78 Am. Jur. 2d, Warehouses §§ 32, 38.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:28 (instruction to jury; "document of title" defined).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:361 et seq (form of negotiation; requirements of "due negotiation").

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, §§ 253:2561 et seq. (storage and transportation of goods, generally).

CJS. 13 C.J.S., Carriers §§ 372, 373.

80 C.J.S., Shipping § 275 et seq.

93 C.J.S., Warehousemen and Safe Depositaries § 35 et seq.

§ 75-7-105. Issuance of tangible document of title as substitute for electronic document; issuance of electronic document as substitute for tangible document.

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

(1) The person entitled under the electronic document surrenders control of the document to the issuer; and

(2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a):

(1) The electronic document ceases to have any effect or validity; and

(2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

(1) The person entitled under the tangible document surrenders possession of the document to the issuer; and

(2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c):

(1) The tangible document ceases to have any effect or validity; and

(2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

SOURCES: Codes, 1942, § 41A:7-105; Laws, 1966, ch. 316, § 7-105; Laws, 2006, ch. 527, § 4; Laws, 2007, ch. 355, § 4; Laws, 2007, ch. 381, § 4, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 4 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 4 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 4 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Special provisions respecting warehouse receipts, see § 75-7-201 et seq.

Special provisions respecting bills of lading, see § 75-7-301 et seq.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers § 307.

67 Am. Jur. 2d, Sales § 371.

78 Am. Jur. 2d, Warehouses § 28.

CJS. 82 C.J.S., Statutes § 486-488, 490.

§ 75-7-106. Control of electronic document of title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a), and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the document was issued; or

(B) If the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or is designated custodian;

(4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

SOURCES: Laws, 2006, ch. 527, § 5; Laws, 2007, ch. 355, § 5; Laws, 2007, ch. 381, § 5, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 5 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 5 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 5 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

PART 2.

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

SEC.

75-7-201. Who may issue a warehouse receipt; storage under government bond.
75-7-202. Form of warehouse receipt; essential terms; optional terms.
75-7-203. Liability for nonreceipt or misdescription.

75-7-204. Duty of care; contractual limitation of warehouse's liability; relationship of section to Chapters 43 and 44 of Title 75.
75-7-205. Title under warehouse receipt defeated in certain cases.
75-7-206. Termination of storage at warehouse's option.
75-7-207. Goods must be kept separate; fungible goods.
75-7-208. Altered warehouse receipts.
75-7-209. Lien of warehouse.
75-7-210. Enforcement of warehouse's lien.

§ 75-7-201. Who may issue a warehouse receipt; storage under government bond.

(a) A warehouse receipt may be issued by any warehouse.

(b) If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse.

SOURCES: Codes, 1942, § 41A:7-201; Laws, 1966, ch. 316, § 7-201; Laws, 2006, ch. 527, § 6; Laws, 2007, ch. 355, § 6; Laws, 2007, ch. 381, § 6, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 6 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 6 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 6 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

Application of obligations imposed by this chapter, see § 75-7-401.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Farm warehouse receipts, see § 75-43-11.

Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Decisions Under Former Statutes.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Decisions Under Former Statutes.

6. In general.

The prime purpose of Uniform Warehouse Receipts Act is to make standard receipts issued by warehousemen for chattels documents of title so that honest purchasers will be protected as purchasers in good faith. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Validity of attempted gift causa mortis made by decedent, who was resident of Mississippi, of cotton in compress located in sister state, and for which decedent held negotiable warehouse receipts, held governed by law applicable in Mississippi. Gidden v. Gidden, 176 Miss. 98, 167 So. 785 (1936).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses § 30.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:61 (warehouse receipts; special provisions; who may issue; storage under government bond).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries § 37 et seq.

§ 75-7-202. Form of warehouse receipt; essential terms; optional terms.

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

(1) The location of the warehouse facility where the goods are stored;

(2) The date of issue of the receipt;

(3) The unique identification code of the receipt;

(4) A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or its order;

(5) The rate of storage and handling charges, but if goods are stored under a field warehousing arrangement, a statement of that fact is sufficient on a nonnegotiable receipt;

(6) A description of the goods or the packages containing them;

(7) The signature of the warehouse or its agent;

(8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, the fact of that ownership; and

(9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, but if the precise amount of advances made or of liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouse or to its agent that issued the receipt, a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to the provisions of the Uniform Commercial Code and do not impair its obligation of delivery under Section 75-7-403 or its duty of care under Section 75-7-204. Any contrary provisions are ineffective.

SOURCES: Codes, 1942, § 7-202; Laws, 1966, ch. 316, § 7-202; Laws, 2006, ch. 527, § 7; Laws, 2007, ch. 355, § 7; Laws, 2007, ch. 381, § 7, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 7 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 7 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 7 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Additional terms of warehouse receipts of grain warehouses, see § 75-44-49.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

II. Pre-Uniform Commercial Code Decisions.

2. In general.

I. Under Current Law.

1. In general.

Where contract for sale of cotton provided that risk of loss remained with seller until warehouse receipts "are issued" or "have been issued" and where cotton was burned after delivery to buyer, but one day prior to completion and issuance of warehouse receipts, words in contract relating to "issue", pursuant to definition in UCC § 3-102, meant that warehouse receipts not only must have been complete in form and signed as required by UCC § 7-202, but must have been delivered to seller; thus, seller was entitled to entire proceeds of insurance settlement since loss occurred prior to time warehouse receipts were issued. Livingston v. Hohenberg Bros. Co., 341 So. 2d 104 (Miss. 1976).

Exculpatory provision in rate schedule agreement relieving warehouseman from liability for damages to stored goods from perils against which bailor had secured insurance was invalid under UCC § 7-202(3), making ineffective any attempt to impair warehouseman's duty of care under UCC § 7-204. Kimberly-Clark Corp. v. Lake Erie Whse., 49 A.D.2d 492 (4th Dep't 1975), appeal dismissed, 39 N.Y.2d 888, 386 N.Y.S.2d 393, 352 N.E.2d 580 (1976).

Warehouseman who issued non-negotiable warehouse receipt covering household goods in names of husband "and/or" wife and delivered receipt to wife, but who released goods to husband's agent on written authorization bearing wife's forged signature, was liable to wife as a matter of law for failing to require third party to produce warehouse receipt. Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).

Where yacht was partially destroyed by fire at marina, clause in yacht storage contract exculpating defendant from liability for damage to yacht "no matter how occasioned" was invalid under Code provision declaring ineffective terms inserted by warehouseman in contract which impair his duty of care. Fireman's Fund Am. Ins. Co. v. Captain Fowler's Marina, Inc., 343 F. Supp. 347 (D. Mass. 1971) (applying Massachusetts law).

II. Pre-Uniform Commercial Code Decisions.

2. In general.

The prime purpose of Uniform Warehouse Receipts Act is to make standard receipts issued by warehousemen for chattels documents of title so that honest purchasers will be protected as purchasers in good faith. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

RESEARCH REFERENCES

ALR. Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses § 32.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:71, 7:72 (warehouse receipts; special provisions; form and contents).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2601 et seq. (form of warehouse receipt; essential terms; optional terms).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 42, 43.

§ 75-7-203. Liability for nonreceipt or misdescription.

A party to or purchaser for value in good faith of a document of title, other than a bill of lading, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

(1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown," "said to contain, " or words of similar import, if the indication is true; or

(2) The party or purchaser otherwise has notice of the nonreceipt or misdescription.

SOURCES: Codes, 1942, § 41A:7-203; Laws, 1966, ch. 316, § 7-203; Laws, 2006, ch. 527, § 8; Laws, 2007, ch. 355, § 8; Laws, 2007, ch. 381, § 8, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 8 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 8 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 8 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Liability of issuer of bill of lading for nonreceipt or misdescription, see § 75-7-301.

Issuer's liability for damages caused by overissue or failure to identify duplicate document as such, see § 75-7-402.

Obligation of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Bank was not entitled under UCC § 7-203 to recover for value of corn allegedly represented by 13 negotiable warehouse receipts where evidence sustained trial court's finding that bank did not take receipts in good faith and without notice that they had been fraudulently issued without any corn ever having been received for them. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977) (affirming trial court's judgment as to all defendants, but withdrawing former opinion rendered in case).

Cause of action for nonreceipt of goods inures exclusively to the party or to the purchaser for value of the warehouse receipt. Sloan v. Clark, 18 N.Y.2d 570, 223 N.E.2d 893 (1966).

Liability under this section was applied against warehouseman issuing receipts for oil where it could not be ascertained whether such oil was ever deposited with him or whether it was deposited and later wrongfully removed. National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp., 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses § 34.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:82-7:83 (liability of warehouseman; nonreceipt or misdescription).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, §§ 253:2621, 253:2622 (liability for nonreceipt or misdescription).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 42, 43.

§ 75-7-204. Duty of care; contractual limitation of warehouse's liability; relationship of section to Chapters 43 and 44 of Title 75.

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. However, unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse's liability for conversion to its own use. The warehouse's liability, on request of the bailor in a record at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt, may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.

(d) This section does not impair or repeal Title 75, Chapter 43, or Title 75, Chapter 44.

SOURCES: Codes, 1942, § 41A:7-204; Laws, 1966, ch. 316, § 7-204; Laws, 2006, ch. 527, § 9; Laws, 2007, ch. 355, § 9; Laws, 2007, ch. 381, § 9, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 9 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 9 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 9 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2. Duty of care.
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II. Pre-Uniform Commercial Code Decisions.

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I. Under Current Law.

1. In general.

The provisions set forth in the instant section are generally comparable to those contained in the provision of former Uniform Warehouse Receipts Act relating to the insertion of certain other terms and conditions. D'Aloisio v. Morton's, Inc., 342 Mass. 231, 172 N.E.2d 819 (1961).

2. Duty of care.

In an action by rice farmers against a rice processing facility for damage allegedly caused by improper treatment of rice, the limitation of warranty of quality contained on the receipt issued for each shipment of rice was applicable as a part of the contract under which the facility received the rice and made it liable only for failure to exercise reasonable care in processing the rice. Baugh Farms, Inc. v. Smith, 495 F. Supp. 40 (N.D. Miss. 1980).

UCC § 7-204(1) codifies the common-law rule of negligence that a warehouseman-bailee of goods must exercise due care to safeguard the goods against damage. S.S. Kresge Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

In action by bailor of household goods against warehouseman to recover value of goods stored which had been damaged by water leakage: (1) although warehouseman alleged that plumbing contractor was negligent in not connecting one of sprinkler system pipes and that this negligence resulted in water leakage which damaged bailor's goods, evidence supported finding that warehouseman breached standard of care contained in UCC § 7-204(1) and was negligent in failing to look at pipes and inspect storage area prior to placing goods; (2) it was error to refuse to admit warehouse receipt for purpose of showing that warehouseman's liability was limited therein to ten cents per pound per article since, inter alia UCC § 7-204(2) specifically authorized warehouseman to limit his liability for damages to stored goods. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

In action by owners of warehoused goods to recover damages for goods destroyed by fire while stored in defendant's warehouse, it was not negligence as matter of law that warehouse did not have night watchman or automatic sprinkling system; furthermore, evidence was sufficient to support finding of jury that warehouseman was not negligent in failing to use reasonable care in inspecting for defects in electrical system. Barlow Upholstery & Furn. Co. v. Emmel, 533 P.2d 900 (Utah 1975).

Exculpatory provision in rate schedule agreement relieving warehouseman from liability for damages to stored goods from perils against which bailor had secured insurance was invalid under UCC § 7-202(3), making ineffective any attempt to impair warehouseman's duty of care under UCC § 7-204. Kimberly-Clark Corp. v. Lake Erie Whse., 49 A.D.2d 492 (4th Dep't 1975), appeal dismissed, 39 N.Y.2d 888, 386 N.Y.S.2d 393, 352 N.E.2d 580 (1976).

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and 7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. Citizens Bank & Trust Co. v. SLT Whse. Co., 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. Ga. 1975) (applying Georgia law).

3. —Independent contractors.

Liability of port as bailee for common-law negligence, as codified by UCC § 7-204(1), for damage to bailor's goods caused by collapse of roof of port's warehouse was supplemented, under UCC § 1-103, by doctrine of strict vicarious liability in tort only to extent that port would be liable for acts of independent contractor over whom port had right of control. S.S. Kresge Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

Although a warehouseman is not an insurer of the stored goods, he must exercise under UCC § 7-204(1) the same degree of skill and care that a reasonable man would necessarily exercise in the operation of the business in which he is engaged. F-M Potatoes, Inc. v. Suda, 259 N.W.2d 487, 23 U.C.C. Rep. Serv. 144 (N.D. 1977) (holding that warehouseman who contracted to provide "conditioned" storage for plaintiff's potatoes was liable for negligently failing to exercise degree of skill and care that reasonable warehouseman would have exercised in providing such storage).

In action by bailor of household goods against warehouseman to recover value of goods stored which had been damaged by water leakage: (1) although warehouseman alleged that plumbing contractor was negligent in not connecting one of sprinkler system pipes and that this negligence resulted in water leakage which damaged bailor's goods, evidence supported finding that warehouseman breached standard of care contained in UCC § 7-204(1) and was negligent in failing to look at pipes and inspect storage area prior to placing goods. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

4. Extent and nature of liability.

In breach-of-contract action by lender bank against warehouseman who, under triparty contract, had agreed to use field-warehousing arrangement to monitor "declared value" of debtor's steel inventory, which was collateral for bank's loan to debtor, (1) magistrate's finding that defendant had negligently breached its agreement to maintain bank's minimum "hold figure" on inventory was not clearly erroneous; and (2) bank's claim that defendant was warehouseman or bailee under Article 7 who was liable for fair-market value of steel missing from debtor's inventory at time of its "loss or conversion" could not be maintained because (a) even if defendant's field-warehousing arrangement with bank and debtor were consonant with standard pattern of warehouseman's duties under Article 7, such duties under UCC § 7-204(1) extended only to protection against "loss or destruction" of bailed goods, and (b) in present case, debtor's steel inventory was neither lost nor destroyed. Merchants & Marine Bank v. Douglas-Guardian Whse. Corp., 801 F.2d 742 (5th Cir. 1986).

Warehouseman's duty extends only to protecting against loss or destruction of bailed goods, such that U.C.C. was not applicable to company's failure to properly monitor inventory of steel company to whom bank had made loan. Merchants & Marine Bank v. Douglas-Guardian Whse. Corp., 801 F.2d 742 (5th Cir. 1986).

Warehouseman was liable for sale of plaintiff's property in violation of UCC § 7-210(1) and (2)(f), and plaintiff as matter of law was entitled to damages based on agreed value of property per pound, as permitted by UCC § 7-204(2). However, plaintiff was not entitled to recover damages for conversion and punitive damages where evidence showed without dispute that erroneous date of sale contained in newspaper notice was result of clerical error not wilfully caused by warehouseman within meaning of UCC 7-210(9). Long's Transf. & Storage v. Busby, 358 So. 2d 393 (Miss. 1978).

Warehouseman who issued non-negotiable warehouse receipt covering household goods in names of husband "and/or" wife and delivered receipt to wife, but who released goods to husband's agent on written authorization bearing wife's forged signature, was liable to wife as a matter of law for failing to require third party to produce warehouse receipt. Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).

5. Limitation of liability.

Connecticut UCC § 7-204(2), dealing with limitation of warehouseman's liability for damages for loss of or injury to stored goods, is merely declaratory of Connecticut common law and was not intended to allow such limitation to become effective unless it had resulted from agreement of parties made under ordinary principles of contract law. Thus, in action for breach of bailment contract brought for defendant's loss of fur coat that plaintiff had placed in storage with defendant, where (1) plaintiff, at time of storing coat, was given receipt on which defendant's employee had written $100" as value of coat, (2) receipt provided that amount recoverable for loss of or damage to coat should not exceed its actual value, or its cost of repair, or "depositor's valuation" appearing on receipt, whichever was the "least," (3) plaintiff did not read receipt until after loss had occurred, (4) value placed on receipt by defendant's employee was not discussed with plaintiff, and (5) receipt was not signed by either party, plaintiff's conduct did not justify conclusion by reasonable person that plaintiff had consented to limitation of damages contained in receipt. Carter v. Reichlin Furriers, 34 Conn. Supp. 661, 386 A.2d 647 (1977).

Warehouseman and common carriers may limit liability to stated value of property. Allright, Inc. v. Elledge, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

The contractual limitation of a warehouseman's liability is enforceable according to whether an opportunity is given to the depositor of goods to obtain an increased valuation by paying increased rates. Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661 (1966), reargument denied, 18 N.Y.2d 751 (1966).

The Uniform Commercial Code appears not to have altered prior law requiring a warehouseman to make an explanation of the injury or loss in the case of bailed merchandise in order to escape liability for nondelivery to the owner. Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

6. —Terms of receipt.

The limitation of warranty of quality contained in the receipts given to drivers delivering rice to a grain elevator is applicable to the extent of its terms; however, the provision that the elevator cannot control the conditions of the harvest and delivery does not relieve the elevator from performing the drying and storage services in a manner consistent with its duty to exercise reasonable care. Baugh Farms, Inc. v. Smith, 495 F. Supp. 40 (N.D. Miss. 1980).

In action against warehouseman for conversion of 2,500 pounds of frozen shrimp stored in defendant's warehouse, provision in warehouse receipt issued to plaintiff which limited defendant's liability for nondelivery of such shrimp to fifty cents per pound was not required by UCC § 7-204(2) to be conspicuous. Sanfisket, Inc. v. Atlantic Cold Storage Corp., 347 So. 2d 647 (Fla. App. 1977), cert. denied, 357 So. 2d 187 (Fla. 1978).

In action by bailor of household goods against warehouseman to recover value of goods stored which had been damaged by water leakage, it was error to refuse to admit warehouse receipt for purpose of showing that warehouseman's liability was limited therein to ten cents per pound per article since, inter alia UCC § 4-204(2) specifically authorized warehouseman to limit his liability for damages to stored goods. Keefe v. Bekins Van & Storage Co., 36 Colo. App. 382, 540 P.2d 1132 (1975).

Under UCC §§ 7-204(2) and 7-309(2) warehouseman and common carriers may limit liability to stated value of property. Allright, Inc. v. Elledge, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Storage contract fairly spelled out limitation of liability and contained provision for increased charges and additional insurance where excess value is declared; held, there was substantial compliance with statutory requirements for limitation of liability in warehouse receipt. Dunfee v. Blue Rock Van & Storage, Inc., 266 A.2d 187 (Del. Super. 1970).

7. —Conversion to own use.

Phrase "conversion to his own use" in UCC § 7-204(2) is synonymous with "conversion," so as to render limitation of liability contained in nonnegotiable warehouse receipt inapplicable where warehouseman converted the bailed goods. Lipman v. Petersen, 223 Kan. 483, 575 P.2d 19 (1978).

8. Presentation of claim.

A provision in a warehouse receipt requiring the customer to file a claim in writing within 30 days after written notice of the damage is mailed to the customer at his last known address is not unreasonable or oppressive. United States Fid. & Guar. Co. v. Mooney's Moving & Storage, Inc., 16 Pa. D. & C.2d 668 (1959).

II. Pre-Uniform Commercial Code Decisions.

9. In general.

One who leaves cotton at a gin is given the gin ticket and told to come back later for the compress warehouse receipt and cotton sample, according to custom, is not estopped to recover the value of a bale of cotton never accounted for by a notation on the gin ticket "Not responsible for cotton left at gin" or by his failure to take his bale home when it would have been impossible for him to have found it among the other bales. Smith v. Farmers Ginning Ass'n, 201 Miss. 573, 29 So. 2d 663 (1947).

Oral contract by warehouseman to procure fire insurance on stored household goods was enforceable and not void as against public policy, and for breach thereof warehouseman was liable for destruction of the goods by fire, where plaintiff had no knowledge of such breach as would cast upon him the duty of procuring insurance coverage. Danko v. Lewy, 149 F.2d 66 (5th Cir. 1945).

Where contract by warehouseman to procure fire insurance was verbal, warehouse receipt did not measure the contract, especially where the receipt did not correctly list the goods stored. Danko v. Lewy, 149 F.2d 66 (5th Cir. 1945).

10. Degree of care.

Warehouseman storing cotton had duty of exercising proper care to prevent spread of fire after it had originated. Jordan v. Federal Compress & Whse. Co., 156 Miss. 514, 126 So. 31 (1930).

Negligence of warehouseman must be based on things which should arouse attention of reasonably prudent person in care of his goods. Oktibbeha County Cotton Whse. Co. v. J.C. Page & Co., 151 Miss. 295, 117 So. 834 (1928).

The receiver appointed at the instance of an insurer of cotton damaged by a flood while stored in a warehouse is liable to the holder of a warehouse receipt only for the value of the cotton in damaged condition, in the absence of evidence showing that damage or injury could have been avoided by the exercise of such care as a reasonably careful owner would exercise. O.B. Crittenden & Co. v. North British & Mercantile Ins. Co. of London, Eng., 31 F.2d 700 (5th Cir. 1929).

11. Burden of proof.

When a bailor shows that goods are delivered to his bailee and are lost or destroyed, a prima facie presumption of negligence arises from which the bailee must absolve himself. Smith v. Farmers Ginning Ass'n, 201 Miss. 573, 29 So. 2d 663 (1947).

Warehouseman has burden of showing lawful excuse for failure to deliver cotton stored and must prove that loss by fire was not due to his negligence. Federal Compress & Whse. Co. v. Coleman, 143 Miss. 620, 109 So. 20 (1926).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Tort liability of warehousemen for theft by servant. 15 A.L.R.2d 829.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of perishable nature. 32 A.L.R.2d 910.

Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller. 54 A.L.R.2d 1361.

Validity of contractual provision limiting place or court in which action may be brought. 56 A.L.R.2d 300.

Warehouseman's liability for injury to stored goods from floods, heavy rains, etc. 60 A.L.R.2d 1097.

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures. 92 A.L.R.2d 1298.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 88 et seq., 143 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:91-7:93, 7:101-7:105 (duty of care; contractual limitation of liability).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2631 et seq. (duty of care; contractual limitation of warehouseman's liability).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries § 73 et seq.

§ 75-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling the goods takes free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated.

SOURCES: Codes, 1942, § 41A:7-205; Laws, 1966, ch. 316, § 7-205; Laws, 2006, ch. 527, § 10, eff from and after July 1, 2006.

Cross References — Good faith purchase of goods, see § 75-2-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Protection of buyer of goods from security interest created by seller, see § 75-9-320.

JUDICIAL DECISIONS

1. In general.

In action against bank which took possession of elevator company for purpose of liquidation, buyer of beans sold by elevator company was not entitled under UCC §§ 7-205 and 7-207 to pro rata distribution with growers of beans that were in elevator, where buyer's claim was based on drafts that buyer issued and which were marked non-negotiable, the beans were never delivered to buyer, and beans were delivered by bank to growers who were the true owners of the beans. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 51, 52.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:111 (instruction to jury; fungible goods purchased from warehouseman-dealer taken free and clear of any claim under a document of title).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 21, 23.

§ 75-7-206. Termination of storage at warehouse's option.

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document of title or, if a period is not fixed, within a stated period not less than thirty (30) days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to Section 75-7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) and Section 75-7-210, the warehouse may specify in the notice given under subsection (a) any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one (1) week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this chapter upon due demand made at any time before sale or other disposition under this section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this section but shall hold the balance for delivery on the demand of any person to which the warehouse would have been bound to deliver the goods.

SOURCES: Codes, 1942, § 41A:7-206; Laws, 1966, ch. 316, § 7-206; Laws, 2006, ch. 527, § 11; Laws, 2007, ch. 355, § 10; Laws, 2007, ch. 381, § 10, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 10 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 10 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 10 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Judicial process with respect to perishable commodities, see § 11-1-43 et seq.

Judicial sale of perishable goods, see § 13-3-167.

Relation of chapter 7 to treaties, statutes, tariffs, classifications, and regulations, see § 75-7-103.

Duty of bailee to deliver goods, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Liens, generally, see § 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

Where storage company and owner of goods orally agreed that company would store goods in company's warehouse, that goods would remain there until shipment to specified destination within one year from date on which contract was made, and that storage charges would accrue until goods were shipped and then be paid along with shipment charges, and where company after storing goods for six months sold them for one dollar more than accrued charges thereon, company did not have right under UCC § 7-206(1) to terminate such storage unilaterally and sell goods. American Transf. & Storage Co. v. Reichley, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978) (overruling storage company's contention that it was entitled to instructed virdict simply because it had complied with UCC § 7-210 in sellling the goods).

UCC § 7-206 does not mean that a warehouseman can terminate the storage of goods at his option, regardless of the agreement of the parties, if there is no document that sets out the period of storage. The language of UCC § 7-206 assumes that a document has been executed, and the statute does not address the situation in which the agreement is entirely oral. American Transf. & Storage Co. v. Reichley, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978).

Fifteen days notice of termination of warehouse bailment is insufficient as a matter of law under UCC § 7-206(1) providing for 30 days' notice. Atkinson v. Port of Seattle, 6 Wash. App. 693, 495 P.2d 686 (1972), review denied, 81 Wash. 2d 1001 (1972).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 140, 141.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:121, 7:122, 7:131, 7:141, 7:151, 7:161(termination of storage at warehouseman's option).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents

of Title, § 253:2651 et seq. (termination of storage at warehouseman's option).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 16-18, 20.

§ 75-7-207. Goods must be kept separate; fungible goods.

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled include all holders to which overissued receipts have been duly negotiated.

SOURCES: Codes, 1942, § 41A:7-207; Laws, 1966, ch. 316, § 7-207; Laws, 2006, ch. 527, § 12; Laws, 2007, ch. 355, § 11; Laws, 2007, ch. 381, § 11, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 11 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 11 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 11 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

In action against bank which took possession of elevator company for purpose of liquidation, buyer of beans sold by elevator company was not entitled under UCC §§ 7-205 and 7-207 to pro rata distribution with growers of beans that were in elevator, where buyer's claim was based on drafts that buyer issued and which were marked non-negotiable, the beans were never delivered to buyer, and beans were delivered by bank to growers who were the true owners of the beans. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

Subdivision 2 of this section changes in some situations the prior law by giving to certain holders of "overissued" receipts for a portion of a fungible mass, the rights of a holder who has made a delivery of existing goods to a warehouseman but by its own terms this provision benefits only those holders to whom overissued receipts have been duly negotiated. National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp., 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

RESEARCH REFERENCES

ALR. Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place. 76 A.L.R.4th 883.

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 27, 111 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:171 (termination of storage at warehouseman's option; separation of stored goods).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, §§ 253:2661, 253:2662 (goods must be kept separate; fungible goods).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 16-23.

§ 75-7-208. Altered warehouse receipts.

If a blank in a negotiable tangible warehouse receipt has been filled in without authority, a good faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor.

SOURCES: Codes, 1942, § 41A:7-208; Laws, 1966, ch. 316, § 7-208; Laws, 2006, ch. 527, § 13; Laws, 2007, ch. 355, § 12; Laws, 2007, ch. 381, § 12, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 12 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 12 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 12 of ch. 381, Laws, 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments § 3 et seq.

78 Am. Jur. 2d, Warehouses § 35.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:181 7:182 (alteration of receipts).

12 Am. Jur. Legal Forms 2d, Liens § 165:31 (notice of sale to satisfy lien-warehousemen's lien).

20 Am. Jur. Legal Forms 2d, Warehouses §§ 258:107, 258:109 (lien of warehouseman).

1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proving fact of alteration).

CJS. 3B C.J.S., Alteration of Instruments § 10-18.

93 C.J.S., Warehousemen and Safe Depositaries §§ 54-64.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-7-209. Lien of warehouse.

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) The warehouse may also reserve a security interest under Title 75, Chapter 9, against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a), such as for money advanced and interest. A security interest is governed by the chapter on Secured Transactions (Title 75, Chapter 9).

(c) A warehouse's lien for charges and expenses under subsection (a) or a security interest under subsection (b) is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell; or with power to obtain delivery under Section 75-7-403; or with power of disposition under Section 75-2-403, 75-2A-304(2), 75-2A-305(2) or 75-9-320 or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection, "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.

(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

SOURCES: Codes, 1942, § 41A:7-209; Laws, 1966, ch. 316, § 7-209; Laws, 2006, ch. 527, § 14; Laws, 2007, ch. 355, § 13; Laws, 2007, ch. 381, § 13, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 13 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 13 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 13 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Seller's tender of delivery of goods in possession of bailee, see § 75-2-503.

Duty of bailee to deliver goods, see § 75-7-403.

Document of title as conferring no rights against person having prior security interest, see § 75-7-503.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Priority of certain liens arising by operation of law, see § 75-9-333.

Liens, generally, see § 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Constitutional questions; due process.
3. Attachment of lien.
4. —Loss of lien.
5. —Nonattachment of lien.
6. Liability for fees and costs.
7. Priority.
8. Miscellaneous.

1. In general.

In deciding whether party was warehouseman so as to avail himself of lien under UCC § 7-209, among the factors to be considered are whether bailor has leased buildings; the duration of the lease; whether bailor pays rent to purported warehouseman; whether bailor exercises actual control over the chattels located in the building; and whether bailor stores property belonging to others in the building. Surks v. Kenmare Storage & Moving Co., 38 A.D.2d 944 (2d Dep't 1972).

2. Constitutional questions; due process.

UCC § 7-209, granting warehousemen lien on goods stored or transported, for fees allegedly owed by customer, and UCC § 7-210, giving warehousemen authority to enforce such lien by public or private sale upon proper notification to customer and adherence to commercially reasonable sale procedures, do not involve state action and, hence, do not violate due process clause of Fourteenth Amendment. Flagg Bros. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

In action under 42 USCS § 1983 in which evicted tenant sought judgment declaring Wisconsin UCC § 7-210, permitting enforcement of warehouseman's lien, unconstitutional on due process grounds, where evidence showed that trial court had granted judgment of eviction, ordered restitution of premises to landlord, and issued writ of restitution, that sheriff had executed writ by removing plaintiff's goods from premises and contracting for services of mover to aid in such removal, and that mover had acquired warehouseman's lien under Wisconsin UCC § 7-209 for storage of plaintiff's goods and right under Wisconsin UCC § 7-210 to sell goods to enforce lien, (1) since writ of restitution issued only after judicial determination that landlord was entitled to possession of premises, plaintiff had had opportunity at a due process hearing to challenge creation of lien prior to writ's issuance and due process did not require second hearing on matter before writ issued; (2) imposition by mover of charges for its services was implicitly authorized by the writ of restitution, and creation of mover's lien without regard to amount thereof was appropriate; and (3) due process did not require that plaintiff be given another hearing to challenge amount of mover's lien before mover could enforce lien under Wisconsin UCC § 7-210. Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872 (E.D. Wis. 1977), motion denied, 467 F. Supp. 573 (E.D. Wis. 1979) (construing Wisconsin law).

It was premature to grant evicted tenant's motion for summary judgment that UCC §§ 7-209 and 7-210 deprived tenant of her property without due process of law where favorable judgment on tenant's cause of action to recover possession of chattels from storage company would have obviated constitutional issue. Jones v. Banner Moving & Storage, Inc., 48 A.D.2d 928 (2d Dep't 1975).

3. Attachment of lien.

Fact question was raised as to whether A properly obtained a lien upon the chattels of B through the issuance of warehouse receipts where there was a departure from the usual procedure in that the warehouseman has allegedly been given control of the building in which the chattels are stored and has not removed them to his own warehouse. Surks v. Kenmare Storage & Moving Co., 38 A.D.2d 944 (2d Dep't 1972).

When goods once removed from a warehouse are subsequently redelivered to it, the warehouseman's lien reattaches to the property and it may retain possession thereof until its storage charges have been paid. St. Germain v. Advance Fireproof Storage Whse. Corp., 44 Misc. 2d 719 (1964).

4. —Loss of lien.

In action by bean growers association for declaratory judgment concerning defendant public warehouseman's refusal to redeliver Great Northern beans stored in defendant's warehouse, although defendant lost its lien under UCC § 7-209(4) by wrongfully demanding that plaintiff pay unjustifiable charge for processing beans, loss of such lien did not deprive defendant of right to set off charges for storage, insurance, and receiving in and loading out against amount due plaintiff as damages for defendant's conversion of beans, since warehouseman's right to compensation survives loss of warehouseman's lien. Associated Bean Growers v. Chester B. Brown Co., 198 Neb. 775, 255 N.W.2d 425 (1977).

5. —Nonattachment of lien.

Where lessor of furnished house did not consent to storage of furniture by lessee, did not misrepresent ownership in any way other than giving lessee possession of furniture and did not acquiesce in lessee's procurement of warehouse receipt, storage company was not entitled to warehouseman's lien for unpaid storage charges under UCC § 7-209 and lessor was entitled to recover furniture or its value from storage company. Disch v. Raven Transf. & Storage Co., 17 Wash. App. 73, 561 P.2d 1097 (1977).

Operator of garage and body shop, who at request of police officer towed plaintiff's automobile from scene of accident and refused to deliver vehicle to plaintiff unless towing and storage charges were paid, had no warehouseman's lien for such charges under UCC § 7-209(1), since mere garage keeper is not warehouseman within meaning of UCC § 7-102(1)(h). Candler v. Ash, 53 Ohio App. 2d 134, 372 N.E.2d 617 (1976) (noting, in holding operator liable for conversion of plaintiff's vehicle, that operator had not issued any warehouse receipt for vehicle).

6. Liability for fees and costs.

In action by bean growers association for declaratory judgment concerning defendant public warehouseman's refusal to redeliver Great Northern beans stored in defendant's warehouse, although defendant lost its lien under UCC § 7-209(4) by wrongfully demanding that plaintiff pay unjustifiable charge for processing beans, loss of such lien did not deprive defendant of right to set off charges for storage, insurance, and receiving in and loading out against amount due plaintiff as damages for defendant's conversion of beans, since warehouseman's right to compensation survives loss of warehouseman's lien. Associated Bean Growers v. Chester B.

Brown Co., 198 Neb. 775, 255 N.W.2d 425 (1977).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, under UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. Nikolas v. Patrick, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Public warehousemen, who commenced separate interpleader actions to determine the ownership of sturgeon and caviar stored with them, after conflicting claims of ownership had been asserted by several defendants, had no lien under this section for attorneys' fees, which were not the usual charges arising out of a storage transaction. National Cold Storage Co. v. Tiya Caviar Co., 52 Misc. 2d 289 (1966).

Where the judgment in an interpleader action brought by a warehouseman is that a party to whom the plaintiff has delivered certain chattels should return them to the plaintiff since they belong to the other claimant, plaintiff may retain possession thereof under the lien granted by this section until the claimant found to be entitled thereto has paid the amount determined to be due the plaintiff, plus interest, costs, and disbursements, and the storage charges which may accrue on such chattels subsequently to the date of redelivery thereof to the warehouse and until such claimant has paid judgment and such charges. St. Germain v. Advance Fireproof Storage Whse. Corp., 44 Misc. 2d 719 (1964).

7. Priority.

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent authority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. K Furn. Co. v. Sanders Transf. & Storage Co., 532 S.W.2d 910 (Tenn. 1975).

8. Miscellaneous.

Where the judgment in an interpleader action brought by a warehouseman is that a party to whom the plaintiff has delivered certain chattels should return them to the plaintiff since they belong to the other claimant, plaintiff may retain possession thereof under the lien granted by this section until the claimant found to be entitled thereto has paid the amount determined to be due the plaintiff, plus interest, costs, and disbursements, and the storage charges which may accrue on such chattels subsequently to the date of redelivery thereof to the warehouse and until such claimant has paid judgment and such charges. St. Germain v. Advance Fireproof Storage Whse. Corp., 44 Misc. 2d 719 (1964).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses §§ 68-70, 72, 75.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:191-7:193 (lien of warehouseman).

12 Am. Jur. Legal Forms 2d, Liens § 165:31 (notice of sale to satisfy lien — warehousemen's lien).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2671 et seq. (lien of warehousemen).

20 Am. Jur. Legal Forms 2d, Warehouses §§ 258:107, 258:109 (lien of warehouseman).

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 143-147.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-7-210. Enforcement of warehouse's lien.

(a) Except as otherwise provided in subsection (b), a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse has sold in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) A warehouse's lien on goods, other than goods stored by a merchant in the course of its business, may be enforced only if the following requirements are satisfied:

(1) All persons known to claim an interest in the goods must be notified.

(2) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten (10) days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(3) The sale must conform to the terms of the notification.

(4) The sale must be held at the nearest suitable place to where the goods are held or stored.

(5) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two (2) weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account the goods are being held, and the time and place of the sale. The sale must take place at least fifteen (15) days after the first publication. If there is no newspaper of general circulation in the county where the sale is to be held, the advertisement must be posted at least ten (10) days before the sale in not less than six (6) conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the warehouse subject to the terms of the receipt and this chapter.

(d) A warehouse may buy at any public sale held pursuant to this section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against which the lien was valid, despite the warehouse's noncompliance with this section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to which the warehouse would have been bound to deliver the goods.

(g) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b).

(i) A warehouse is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

SOURCES: Codes, 1942, § 41A:7-210; Laws, 1966, ch. 316, § 7-210; Laws, 2006, ch. 527, § 15; Laws, 2007, ch. 355, § 14; Laws, 2007, ch. 381, § 14, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 14 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 14 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 14 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Disposition of goods in lawful enforcement of lien as excusing bailee's obligation to deliver, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Liens, generally, see § 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general; constitutional questions.
2. —"Under color of state law."
3. Public notice of sale.
4. Sale.

1. In general; constitutional questions.

In action under 42 USCS § 1983 in which evicted tenant sought judgment declaring Wisconsin UCC § 7-210, permitting enforcement of warehouseman's lien, unconstitutional on due process grounds, where evidence showed that trial court had granted judgment of eviction, ordered restitution of premises to landlord, and issued writ of restitution, that sheriff had executed writ by removing plaintiff's goods from premises and contracting for services of mover to aid in such removal, and that mover had acquired warehouseman's lien under Wisconsin UCC § 7-209 for storage of plaintiff's goods and right under Wisconsin UCC § 7-210 to sell goods to enforce lien, (1) since writ of restitution issued only after judicial determination that landlord was entitled to possession of premises, plaintiff had had opportunity at a due process hearing to challenge creation of lien prior to writ's issuance and due process did not require second hearing on matter before writ issued; (2) imposition by mover of charges for its services was implicitly authorized by the writ of restitution, and creation of mover's lien without regard to amount thereof was appropriate; and (3) due process did not require that plaintiff be given another hearing to challenge amount of mover's lien before mover could enforce lien under Wisconsin UCC § 7-210. Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872 (E.D. Wis. 1977), motion denied, 467 F. Supp. 573 (E.D. Wis. 1979) (construing Wisconsin law).

It was premature to grant evicted tenant's motion for summary judgment that UCC §§ 7-209 and 7-210 deprived tenant of her property without due process of law where favorable judgment on tenant's cause of action to recover possession of chattels from storage company would have obviated constitutional issue. Jones v. Banner Moving & Storage, Inc., 48 A.D.2d 928 (2d Dep't 1975).

In evicted tenant's action for recovery of chattels, any determination of constitutionality of UCC provisions dealing with retention and enforcement provisions of warehousemen's liens was premature, since resolution of constitutional issue could have been obviated by possession. Jones v. Banner Moving & Storage, Inc., 48 A.D.2d 928 (2d Dep't 1975).

Where possession of certain goods has been surrendered to a warehouseman, even though allegedly surrendered by a debtor who claimed to have been forced to sign a blank contract, the statute permitting warehousemen to execute a lien on such goods without prior determination by the courts as to the validity of the lien does not deprive the person surrendering such goods of due process of law. Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972).

Code provision for enforcement of warehouseman's lien was not unconstitutional on ground that it permitted warehouseman to execute on statutory lien without prior determination by court of amount of lien. Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972).

Where possession of goods had been voluntarily surrendered to warehouseman, UCC § 7-210 was not violative of constitutional due process in permitting sale of bailed goods without prior judicial hearing, since goods voluntarily surrendered were not such that deprivation thereof would drive debtor "to the wall", even where debtor claimed that he signed contract with warehouseman in blank and while under duress. Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir. N.Y. 1972), cert. denied, 406 U.S. 961, 92 S. Ct. 2074, 32 L. Ed. 2d 349 (1972), reh'g denied, 408 U.S. 932, 92 S. Ct. 2505, 33 L. Ed. 2d 345 (1972) (applying New York law).

2. —"Under color of state law."

Sale by warehouseman of personal property of plaintiffs under UCC § 7-210 for nonpayment of storage charges did not constitute "state action" for purposes of claim that such sale violated plaintiffs' rights under due process and equal protection clauses of Fourteenth Amendment, and plaintiffs were not entitled to relief under 42 USCS § 1983 (which authorizes civil action for deprivation, by one acting under color of state statute, of right secured by constitution), since (1) UCC § 7-210 does not delegate exclusive prerogative of the sovereign to a warehouseman, and (2) warehouseman's sale under UCC § 7-210 is not attributable to state on ground that state authorized and encouraged such sale by enacting UCC § 7-210. Flagg Bros. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

A warehouseman's sale of individuals' stored goods for their nonpayment of storage charges, which sale is authorized by CLS, UCC § 7-210 governing the enforcement of a warehouseman's lien, does not constitute "state action" for purposes of the claim that the sale violates the Fourteenth Amendment's due process and equal protection clauses-the individuals thus failing to state a claim for relief under 42 USCS § 1983, which authorizes a civil action for deprivation, by a person acting under color of a state statute, of a right "secured by the Constitution"-since the law does not delegate to a warehouseman an exclusive prerogative of the sovereign, and a warehouseman's sale under the law cannot be attributed to the state on the ground that the state authorized and encouraged such sales by enacting the law. Flagg Bros. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

UCC § 7-209, granting warehousemen lien on goods stored or transported, for fees allegedly owed by customer, and UCC § 7-210, giving warehousemen authority to enforce such lien by public or private sale upon proper notification to customer and adherence to commercially reasonable sale procedures, do not involve state action and, hence, do not violate due process clause of Fourteenth Amendment. Flagg Bros. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

Sale by warehouseman under UCC § 7-210 of bakery equipment belonging to plaintiff corporation was act done under color of state law within meaning of 42 USCS § 1983 (authorizing civil action for deprivation, by one acting under color of state statute, of rights secured by constitution); and such sale, which deprived plaintiff of its property without hearing, violated due process clause of Fourteenth Amendment where (1) issue of deprivation was at all times in sole hands of warehouseman, who decided that all charges against property sold were just, that each charge was legally secured by his warehouseman's lien, that sale would be made by auction, and that he would appoint auctioneer; and (2) there was no supervision of such sale by any state or local officials and no opportunity for plaintiff to post bond. Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc., 554 F.2d 356 (8th Cir. N.D. 1977).

Action of warehousemen in selling stored items under UCC § 7-210 without prior hearing was private action and not action "under color of state law," giving rise to Civil Rights Act action, where, inter alia, storage contract entered into between customers and warehousemen specified that warehousemen should have general lien on all stored property with right to sell property on default. Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974).

3. Public notice of sale.

Warehouseman was liable for sale of plaintiff's property in violation of UCC § 7-210(1) and (2)(f), and plaintiff as matter of law was entitled to damages based on agreed value of property per pound, as permitted by UCC § 7-204(2). However, plaintiff was not entitled to recover damages for conversion and punitive damages where evidence showed without dispute that erroneous date of sale contained in newspaper notice was result of clerical error not wilfully caused by warehouseman within meaning of UCC 7-210(9). Long's Transf. & Storage v. Busby, 358 So. 2d 393 (Miss. 1978).

Requirement that warehouseman advertise sale of goods sold to satisfy its lien was applicable to carrier. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478 (6th Cir. Ohio 1973).

4. Sale.

Where storage company and owner of goods orally agreed that company would store goods in company's warehouse, that goods would remain there until shipment to specified destination within one year from date on which contract was made, and that storage charges would accrue until goods were shipped and then be paid along with shipment charges, and where company after storing goods for six months sold them for one dollar more than accrued charges thereon, company did not have right under UCC § 7-206(1) to terminate such storage unilaterally and sell goods. American Transf. & Storage Co. v. Reichley, 560 S.W.2d 196 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 29, 1978) (overruling storage company's contention that it was entitled to instructed verdict simply because it had complied with UCC § 7-210 in selling the goods).

RESEARCH REFERENCES

Am Jur. 78 Am. Jur. 2d, Warehouses § 76 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:201-7:203 (lien of warehouseman; enforcement).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2681 et seq. (enforcement of warehouseman's lien).

13 Am Jur, Carriers § 533.

CJS. 93 C.J.S., Warehousemen and Safe Depositaries §§ 150, 151.

PART 3.

BILLS OF LADING: SPECIAL PROVISIONS.

Sec.

75-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.
75-7-302. Through bills of lading and similar documents of title.
75-7-303. Diversion; reconsignment; change of instructions.
75-7-304. Tangible bills of lading in a set.
75-7-305. Destination bills.
75-7-306. Altered bills of lading.
75-7-307. Lien of carrier.
75-7-308. Enforcement of carrier's lien.
75-7-309. Duty of care; contractual limitation of carrier's liability.

§ 75-7-301. Liability for nonreceipt or misdescription; "said to contain"; "shipper's load and count"; improper handling.

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document of title indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in which the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load and count," or words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of the bill of lading, the issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk and words such as "shipper's weight, load and count," or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed by packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of the bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper's request in a record to do so. In that case, "shipper's weight" or other words of similar import are ineffective.

(d) The issuer, by including in the bill of lading the words "shipper's weight, load and count," or words of similar import, may indicate that the goods were loaded by the shipper, and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of the issuer to that indemnity does not limit its responsibility or liability under the contract of carriage to any person other than the shipper.

SOURCES: Codes, 1942, § 41A:7-301; Laws, 1966, ch. 316, § 7-301; Laws, 2006, ch. 527, § 16; Laws, 2007, ch. 355, § 15; Laws, 2007, ch. 381, § 15, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 15 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 15 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 15 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Liability of issuer of warehouse receipt for nonreceipt or misdescription of goods, see § 75-7-203.

Care required of carrier issuing bill of lading, see § 75-7-309.

Issuer's liability for damages caused by overissue or failure to identify duplicate document as such, see § 75-7-402.

Obligation of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Bill of lading did not incorporate terms of time charter, and thus did not incorporate arbitration clause of charter, where blanks on bill of lading incorporation provision were not filled in. CIA. Platamon de Navegacion, S.A. v. Empresa Colombiana de Petroleos, 478 F. Supp. 66 (S.D.N.Y. 1979).

If no bill of lading is issued for interstate shipment, the terms of the Uniform Bill of Lading control. Norca Corp. v. Pilot Freight Carriers, Inc., 63 Misc. 2d 684 (1970).

Where evidence establishes that damage to goods being shipped was direct result of improper loading, "shipper's weight, load and count" bill of lading shall operate as complete defense for carrier as to such damage. D.H. Overmyer Co. v. Nelson-Brantley Glass Co., 119 Ga. App. 599, 168 S.E.2d 176 (1969).

A plaintiff, who occupied the position of an assignee, transferee, or pledgee of nonnegotiable straight bills of lading, was not a "consignee", the only party protected by UCC § 7-301 and could not successfully sue on two intrastate bills issued for nonexistent goods. G.A.C. Com. Corp. v. Wilson, 271 F. Supp. 242 (S.D.N.Y. 1967).

RESEARCH REFERENCES

ALR. Carrier's issuance of bill of lading, or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received. 33 A.L.R.2d 867.

Rail or motor freight carrier's liability for loss through weight deficiency of goods shipped. 39 A.L.R.2d 325.

Liability of carrier by land or air for damage to goods shipped resulting from improper loading. 44 A.L.R.2d 993.

Conclusiveness of receipt clauses in bill of lading. 67 A.L.R.2d 1028.

Am Jur. 13 Am. Jur. 2d, Carriers § 323 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:211 et seq. (liability for misdating, nonreceipt, or misdescription).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2701 et seq. (liability for nonreceipt or misdescription; "said to contain;" "shipper's load and count;" improper handling).

CJS. 13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping §§ 279-284.

§ 75-7-302. Through bills of lading and similar documents of title.

(a) The issuer of a through bill of lading or other document of title embodying an undertaking to be performed in part by a person acting as its agent or by a performing carrier is liable to any person entitled to recover on the document for any breach by the other person or the performing carrier of its obligation under the document. However, to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation, this liability for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person's obligation is discharged by delivery of the goods to another person pursuant to the document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the document occurred:

(1) The amount it may be required to pay to any person entitled to recover on the document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and

(2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the document for the breach.

SOURCES: Codes, 1942, § 41A:7-302; Laws, 1966, ch. 316, § 7-302; Laws, 2006, ch. 527, § 17; Laws, 2007, ch. 355, § 16; Laws, 2007, ch. 381, § 16, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 16 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 16 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 16 of ch. 381, Laws, 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Air carrier that issued bill of lading to shipper was liable to shipper for loss of gold coins which occurred while coins were in possession of connecting air carrier and connecting air carrier in turn, was liable to originating air carrier, notwithstanding claim of connecting air carrier that shipper and/or originating air carrier failed to comply with applicable tariffs with regard to shipment in that advance arrangements had not been made for shipment of extraordinary value, since there was no showing that shipper's or originating air carrier's acts had any causal connection with loss of coins. Braniff Airways Inc. v. El Paso Coin Co., 517 S.W.2d 915 (Tex. Civ. App. 1974), ref. n.r.e., cert. denied, 423 U.S. 1032, 96 S. Ct. 563, 46 L. Ed. 2d 405 (1975).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 413-416, 478, 489.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:251-7:253 (through bills and similar documents).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2711 et seq. (through bills of lading and similar documents).

CJS. 13 C.J.S., Carriers § 380.

80 C.J.S., Shipping §§ 279-284.

§ 75-7-303. Diversion; reconsignment; change of instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) The holder of a negotiable bill;

(2) The consignor on a nonnegotiable bill even if the consignee has given contrary instruction;

(3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or

(4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms.

SOURCES: Codes, 1942, § 41A:7-303; Laws, 1966, ch. 316, § 7-303; Laws, 2006, ch. 527, § 18; Laws, 2007, ch. 355, § 17; Laws, 2007, ch. 381, § 17, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 17 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 17 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 17 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Duty of bailee to deliver goods to person entitled thereto under document, see § 75-7-403.

Effect of consignor's diversion or change of shipping instructions, see § 75-7-504(3).

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Where seller sold two carloads of fertilizer to buyer, received two checks in payment therefore, and shipped goods by railroad under straight, nonnegotiable bills of lading, where buyer resold goods to plaintiff, and where, after bank notified seller there were insufficient funds to cover buyer's checks, seller issued reconsignment order to railroad instructing it to deliver goods to another consignee, neither seller nor railroad was liable to plaintiff for cost of goods: (1) under UCC § 2-703, upon failure of checks presented by buyer to seller, seller was lawfully entitled to possession of goods; (2) under UCC 7-303, since bills of lading were nonnegotiable, railroad was obligated to deliver goods pursuant to instructions of seller, as consignor. Clock v. Missouri-Kan.-Tex. R.R., 407 F. Supp. 448 (E.D. Mo. 1976), aff'd, 553 F.2d 102 (8th Cir. Mo. 1977) (applying Missouri law).

The consignee or other holder of a negotiable bill of lading is ordinarily the only person entitled to authorize a diversion or modification of the delivery terms. Koreska v. United Cargo Corp., 23 A.D.2d 37 (1st Dep't 1965).

RESEARCH REFERENCES

ALR. Liability for damages from loss of shipper's opportunity to sell or divert goods at intermediate point because of carrier's deviation from route. 33 A.L.R.2d

145.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 413-416.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:252 (through bills and similar documents; defense of no conversion, by virtue of seller's agent authorizing carrier to surrender goods without receiving bill of lading).

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:261, 7:262 (diversion; reconsignment; change of instructions).

CJS. 13 C.J.S., Carriers §§ 396, 397, 399, 400.

80 C.J.S., Shipping § 287 et seq.

§ 75-7-304. Tangible bills of lading in a set.

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one (1) bill.

(c) If a tangible negotiable bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee is obliged to deliver in accordance with Part 4 of this chapter against the first presented part of a tangible bill of lading lawfully issued in a set. Delivery in this manner discharges the bailee's obligation on the whole bill.

SOURCES: Codes, 1942, § 41A:7-304; Laws, 1966, ch. 316, § 7-304; Laws, 2006, ch. 527, § 19; Laws, 2007, ch. 355, § 18; Laws, 2007, ch. 381, § 18, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 18 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 18 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 18 of ch. 381, Laws, 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Rights under document of title purporting to cover goods already represented by outstanding document, see § 75-7-402.

Bailee's obligation to deliver, see § 75-7-403.

Negotiation of documents of title, see § 75-7-501.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 312, 351.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:271, 7:272 (bills in a set).

CJS. 13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping § 287 et seq.

§ 75-7-305. Destination bills.

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against a carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to Section 75-7-105, may procure a substitute bill to be issued at any place designated in the request.

SOURCES: Codes, 1942, § 41A:7-305; Laws, 1966, ch. 316, § 7-305; Laws, 2006, ch. 527, § 20; Laws, 2007, ch. 355, § 19; Laws, 2007, ch. 381, § 19, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 19 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 19 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 19 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers, §§ 308, 310, 315, 339.

CJS. 13 C.J.S., Carriers §§ 390-393.

§ 75-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

SOURCES: Codes, 1942, § 41A:7-306; Laws, 1966, ch. 316, § 7-306, eff March 31, 1968.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments §§ 1, 2.

13 Am. Jur. 2d, Carriers §§ 309, 314.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:281-7:283 (altered bills of lading).

1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proving fact of alteration).

CJS. 3B C.J.S., Alteration of Instruments § 7 et seq.

13 C.J.S., Carriers § 381.

§ 75-7-307. Lien of carrier.

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other lien under subsection (a) is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver.

SOURCES: Codes, 1942, § 41A:7-307; Laws, 1966, ch. 316, § 7-307; Laws, 2006, ch. 527, § 21; Laws, 2007, ch. 355, § 20; Laws, 2007, ch. 381, § 20, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 20 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 20 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 20 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Warehousemen's lien, see § 75-7-209.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Application of statute governing secured transactions to security interests created by lien, see § 75-9-102(2).

Perfection of security interests in goods covered by documents, see § 75-9-312.

Liens, generally, see § 85-7-1 et seq.

JUDICIAL DECISIONS

1. In general.

With respect to two automobiles in possession of towing companies that refused to surrender possession of them until towing and storage charges were paid, one automobile having been towed from scene of accident at direction of police and other automobile having been removed from private property at direction of property owner, towing companies were not entitled to lien for towing and storage charges under UCC § 7-307 since automobiles were not covered by bill of lading as required by § 7-307(1). In any case, towing companies were not entitled to assert liens against automobile owners under § 7-307(2) since neither vehicle was alleged to have been towed because towing companies were required to do so by law, or at the instruction of a bailor who was permitted to exercise control over automobiles. Younger v. Plunkett, 395 F. Supp. 702 (E.D. Pa. 1975) (applying Pennsylvania law).

Lien on leased sidings was lost when they were voluntarily delivered; held, sale to satisfy alleged lien would amount to conversion. Darby v. B & O R.R., 259 Md. 493, 270 A.2d 652 (1970).

The lien of a common carrier for the cost of transporting a house trailer from Virginia to Oklahoma was subordinate to a prior security interest perfected in Virginia of which the carrier was charged with notice. National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co., 420 P.2d 889 (Okla. 1966).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state statute giving carrier lien on goods for transportation and incidental storage charges. 45 A.L.R.5th 227.

Am Jur. 13 Am. Jur. 2d, Carriers § 494 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:291, 7:292 (lien of carrier).

CJS. 13 C.J.S., Carriers §§ 473-479, 483, 484.

80 C.J.S., Shipping §§ 394, 395.

§ 75-7-308. Enforcement of carrier's lien.

(a) A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier has sold goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and this chapter.

(c) A carrier may buy at any public sale pursuant to this section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the carrier would have been bound to deliver the goods.

(f) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) or the procedure set forth in Section 75-7-210(b).

(h) A carrier is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion.

SOURCES: Codes, 1942, § 41A:7-308; Laws, 1966, ch. 316, § 7-308; Laws, 2006, ch. 527, § 22; Laws, 2007, ch. 355, § 21; Laws, 2007, ch. 381, § 21, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 21 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 21 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 21 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

In trover action brought by express company against purchasers of goods sold by another carrier at public sale to enforce carrier's lien, under UCC § 7-308(4) purchasers, who were in good faith as defined by UCC § 1-201(19), took goods free of any claim of plaintiff express company. REA Express, Inc. v. Ginn, 131 Ga. App. 33, 205 S.E.2d 94 (1974).

RESEARCH REFERENCES

ALR. Validity, construction, and application of state statute giving carrier lien on goods for transportation and incidental storage charges. 45 A.L.R.5th 227.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 360, 442, 483.

18 Am. Jur. 2d, Conversion § 20.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:301-7:303.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2721 et seq. (enforcement of carrier's lien).

CJS. 13 C.J.S., Carriers § 484.

80 C.J.S., Shipping §§ 394, 395.

§ 75-7-309. Duty of care; contractual limitation of carrier's liability.

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement.

SOURCES: Codes, 1942, § 41A:7-309; Laws, 1966, ch. 316, § 7-309; Laws, 2006, ch. 527, § 23; Laws, 2007, ch. 355, § 22; Laws, 2007, ch. 381, § 22, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 22 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 22 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 22 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Application of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Liability of issuer of bill of lading for nonreceipt or misdescription, see § 75-7-301.

Obligation of bailee to delivery goods to person entitled under document, see § 75-7-403.

Absence of liability for good faith delivery of goods according to terms of document of title, etc., see § 75-7-404.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.
2. —Claim.
3. —Within 9 months.
4. Limitation of liability.
5. —Opportunity to declare higher value.

6. Practice and procedure.

1. In general.

Where neither the goods in question nor the bill of lading pertaining thereto were delivered by the carrier to the consignee, the provisions of the Uniform Commercial Code did not apply where the consignee claimed the loss of the goods. Wells & Coverly, Inc. v. Red Star Express Lines of Auburn, Inc., 62 Misc. 2d 269 (1969).

2. —Claim.

In order to constitute a claim, the carrier should be advised that a loss occurred, the nature of the loss, the nature of the shipment involved, the approximate date of shipment, its point of origin and destination, and that the parties to the shipment expect restitution or reimbursement. Norca Corp. v. Pilot Freight Carriers, Inc., 63 Misc. 2d 684 (1970).

In order for a claim to comply with the provisions of Uniform Bill of Lading, the shipper must, in writing, convey the information that a demand for damages is being made or will be made. Interchemie, Ltd. v. Eastern Express, Inc., 62 Misc. 2d 850 (1970).

3. —Within 9 months.

Nine-month notice of claim requirement was "reasonable provision" within meaning of Code § 7-309(3). Sydnor & Hundley, Inc. v. Wilson Trucking Corp., 213 Va. 704, 194 S.E.2d 733 (1973).

Where there was no bill of lading provision providing otherwise, as part of the contract of carriage and as a condition precedent to recovery for failure to deliver goods, claims must be filed in writing within nine months, and an action thereon must be instituted within two years. Norca Corp. v. Pilot Freight Carriers, Inc., 63 Misc. 2d 684 (1970).

The consignee was not bound by the terms of a bill of lading between the shipper and the motor carrier providing that claims must be filed with the carrier within nine months after the loss. Wells & Coverly, Inc. v. Red Star Express Lines of Auburn, Inc., 62 Misc. 2d 269 (1969).

4. Limitation of liability.

Warehouseman and common carriers may limit liability to stated value of property. Allright, Inc. v. Elledge, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Under UCC §§ 7-204(2) and 7-309(2) warehouseman and common carriers may limit liability to stated value of property. Allright, Inc. v. Elledge, 515 S.W.2d 266 (Tex. 1974), answer to certified question conformed to, 513 S.W.2d 875 (Tex. Civ. App. 1974).

Fact that contract between shipper and time charterer stated that it was to be governed by New York law, and UCC § 7-309(2), as adopted in New York, allowed carrier to limit liability to value stated in bill of lading only when carrier's rates were dependent on value, did not affect time charterer's entitlement to damage limitation contained in Carriage of Goods by Sea Act in light of UCC § 7-103 making UCC subject to any treaty or statute of the United States. Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser, 507 F.2d 68 (2d Cir. N.Y. 1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975) (involving New York law).

Employee of common carrier is entitled to benefit of limitation of liability of carrier for negligence. Howard v. Finnegans Whse. Corp., 33 A.D.2d 1090 (3d Dep't 1970).

5. —Opportunity to declare higher value.

Under UCC § 7-309(2), where a tariff has been filed, it is the tariff that must afford the shipper an opportunity to declare a higher value on the goods shipped. Only where no tariff has been filed does the carrier have a duty to inform the shipper by some other means of the opportunity to declare a higher value on the goods. Elizabeth-Perkins, Inc. v. Morgan Express, Inc., 554 S.W.2d 216 (Tex. Civ. App. 1977).

In consignee's suit against carrier to recover value of three dresses delivered to carrier for return shipment to plaintiff, where such dresses which were worth $600 were originally shipped by plaintiff to customer on approval and their true value was noted on waybill for such shipment, and where customer returned dresses to plaintiff but did not declare their true value on return shipment and waybill for such shipment limited shipper's liability to $50 unless greater value was declared, (1) plaintiff as consignee of return shipment was entitled to recover from carrier; (2) carrier's liability was limited to $50; and (3) carrier in order to rely on such limitation of liability was not required by UCC § 7-309(2) to prove that it had expressly called shipper's attention to waybill's liability-limitation provision, since carrier had filed tariff containing such provision with state railroad commission and carrier's rates under the tariff of shipments and distance shipped. Elizabeth-Perkins, Inc. v. Morgan Express, Inc., 554 S.W.2d 216 (Tex. Civ. App. 1977).

6. Practice and procedure.

Breach of duty of due care imposed on carriers by UCC § 7-309(1) gave rise to action for breach of contract, but does not give rise to independent tort action, and UCC § 7-309(2) authorizing limitations of liability for carrier was not rendered inapplicable by failure to carrier to exercise duty of due care. Gibson v. Greyhound Bus Lines, 409 F. Supp. 321 (M.D. Fla. 1976), aff'd, 539 F.2d 708 (5th Cir. Fla. 1976).

In action by owners, consignees and shippers against marine terminal operator to recover value of goods destroyed by fire, one-year limitation for commencing suit contained in bills of lading was "reasonable" under UCC § 7-309(3) and was, therefore, valid; however, portion of clause in bills of lading providing that "suit shall not be deemed brought until jurisdiction has been obtained," establishing service of process as necessary to commencement of suit, would not be given effect and action against terminal operator was commenced with filing of complaint, not with service of process. Lawrence R. McCoy Co. v. S.S. Theomitor III, 133 N.J. Super. 308, 336 A.2d 80 (L. Div. 1975).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped. 25 A.L.R.2d 770.

Validity of contractual provision limiting place or court in which action may be brought. 56 A.L.R.2d 300.

Conclusiveness of receipt clauses in bill of lading. 67 A.L.R.2d 1028.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 306-308, 310-312, 322-327.

14 Am. Jur. 2d, Carriers §§ 503 et seq., 521 et seq., 543 et seq.

18 Am. Jur. 2d, Conversion § 17.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:311-7:314 (duty of care; contractual limitation of carrier's liability).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2731 et seq. (duty of care; contractual limitation of carrier's liability).

CJS. 13 C.J.S., Carriers §§ 411, 412, 414.

80 C.J.S., Shipping § 294 et seq.

Part 4.

Warehouse Receipts and Bills of Lading: General Obligations.

Sec.	
75-7-401.	Irregularities in issue of receipt or bill or conduct of issuer.
75-7-402.	Duplicate receipt or bill; overissue.
75-7-403.	Obligation of warehouse or carrier to deliver; excuse.
75-7-404.	No liability for good faith delivery pursuant to receipt or bill.

§ 75-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this chapter on an issuer apply to a document of title even if:

(1) The document does not comply with the requirements of this chapter or of any other statute, rule, or regulation regarding its issue, form, or content;

(2) The issuer violated laws regulating the conduct of its business;

(3) The goods covered by the document were owned by the bailee when the document was issued; or

(4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt.

SOURCES: Codes, 1942, § 41A:7-401; Laws, 1966, ch. 316, § 7-401; Laws, 2006, ch. 527, § 24; Laws, 2007, ch. 355, § 23; Laws, 2007, ch. 381, § 23, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 23 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m), amended this section. Section 23 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 23 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Application of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Liability of issuer of document of title for nonreceipt or misdescription of goods, see § 75-7-203.

Liability of warehouseman for damages for loss of or injury to goods, see § 75-7-204.

Liability of issuer of bill of lading for non-receipt or misdescription of goods, see § 75-7-301.

Care required of carrier issuing bill of lading, see § 75-7-309.

Obligation of bailee to deliver goods to person entitled under document, see § 75-7-403.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 308, 310-312, 339.

78 Am. Jur. 2d, Warehouses §§ 28, 30.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:321-7:323 (irregularities in issue or in conduct of issuer).

CJS. 8 C.J.S., Bailments §§ 18, 25 et seq.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping §§ 279-284.

93 C.J.S., Warehousemen and Safe Depositaries § 42 et seq.

§ 75-7-402. Duplicate receipt or bill; overissue.

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to Section 75-7-105. The issuer is liable for damages caused by its overissue or failure to identify a duplicate document by a conspicuous notation.

SOURCES: Codes, 1942, § 41A:7-402; Laws, 1966, ch. 316, § 7-402; Laws, 2006, ch. 527, § 25; Laws, 2007, ch. 355, § 24; Laws, 2007, ch. 381, § 24, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 24 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 24 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 24 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Rights under overissued warehouse receipts for commingled fungible goods, see § 75-7-207(2).

Liability as to bill of lading drawn in set of parts, see § 75-7-304.

Rights conferred against person having interest prior to issuance of document of title, see § 75-7-503.

Court's order where document of title lost, stolen or destroyed, see § 75-7-601.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

Where carrier, having issued two original bills of lading and having been informed that original bills had either been lost or destroyed, issued duplicate original set of bills of lading, carrier was obliged to deliver goods to party presenting them; duplicate original bills of lading served same purpose as that of original bills of lading, i.e., to enable party holding document to present it and to obtain possession of goods. Zervos v. S.S. Sam Houston, 427 F. Supp. 500 (S.D.N.Y. 1976), aff'd, 636 F.2d 1202 (2d Cir. N.Y. 1980) (applying New York law).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 309-312, 314, 349, 350, 434.

78 Am. Jur. 2d, Warehouses § 33.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:331, 7:332 (duplicate and overissued documents).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, §§ 253:2741, 253:2742 (duplicate receipt of bill; overissue).

CJS. 8 C.J.S., Bailments §§ 18, 25 et seq.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping §§ 279-284.

93 C.J.S., Warehousemen and Safe Depositaries § 42 et seq.

§ 75-7-403. Obligation of warehouse or carrier to deliver; excuse.

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c), unless and to the extent that the bailee establishes any of the following:

(1) Delivery of the goods to a person whose receipt was rightful as against the claimant;

(2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;

(3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouse's lawful termination of storage;

(4) The exercise by a seller of its right to stop delivery pursuant to Section 75-2-705 or by a lessor of its right to stop delivery pursuant to Section 75-2A-526;

(5) A diversion, reconsignment, or other disposition pursuant to Section 75-7-303;

(6) Release, satisfaction, or any other fact according a personal defense against the claimant; or

(7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is one against which the document of title does not confer a right under Section 75-7-503(a):

(1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and

(2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or be liable to any person to which the document is duly negotiated.

SOURCES: Codes, 1942, § 41A:7-403; Laws, 1966, ch. 316, § 7-403; Laws, 2006, ch. 527, § 26; Laws, 2007, ch. 355, § 25; Laws, 2007, ch. 381, § 25, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 25 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 25 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 25 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Effect of treaties, statutes, tariffs, and regulations, see § 75-7-103.

Warehouseman's liability for loss of or injury to goods, see § 75-7-204.

Duty and liability of carrier issuing bill of lading, see § 75-7-309.

Rights acquired on negotiation of document of title, see § 75-7-502.

Document of title to goods defeated in certain cases, see § 75-7-503.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
2. Particular applications.
3. Practice and procedure.
4. —Burden of proof.

II. Pre-Uniform Commercial Code Decisions.

5. Decisions under former Code 1942 § 5019.
6. Decisions under former Code 1942 § 5020.
7. Decisions under former Code 1942 § 5022.

I. Under Current Law.

1. In general.

Provisions relating to the obligation of the warehouseman to deliver under the Uniform Warehouse Receipts Act are now found in subdivision (1)(b) of the instant section. D'Aloisio v. Morton's, Inc., 342 Mass. 231, 172 N.E.2d 819 (1961).

2. Particular applications.

In action by secured party against warehouseman for value of warehoused cattle, where nonnegotiable warehouse receipts provided that cattle were to be delivered for sale on written instructions of secured party, secured party by letter authorized warehouseman to deliver cattle for sale and also required confirmation of delivery by next business day, cattle were delivered to feed-lot operator and immediately released by operator to purchaser, warehouseman failed to give notice of delivery within time specified, and secured party never received proceeds of sale, (1) warehouseman's obligation to deliver cattle was governed by UCC § 7-403(1) and (4); (2) requirement in secured party's letter about confirming delivery of cattle by next business day was independent covenant and not condition subsequent to warehouseman's authority to release cattle; (3) although warehouseman did not misdeliver cattle, warehouseman's failure to give secured party timely confirmation of delivery gave rise to liability for breach of contract; and (4) trial court should have granted warehouseman's request for instruction on question whether secured party's loss was caused by failure to give timely confirmation of delivery. Utica Nat'l Bank & Trust Co. v. Happy Wheat Growers, Inc., 558 F.2d 279 (5th Cir. Tex. 1977) (applying Texas law).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, under UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. Nikolas v. Patrick, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Warehouse in which cotton was stored was, according to bailment contract, obligated to release cotton only upon presentation of negotiable warehouse receipt. Citizens Co-op Gin v. United States, 427 F.2d 692 (5th Cir. Tex. 1970).

The consignee or other holder of a negotiable bill of lading is ordinarily the only person entitled to authorize a diversion or modification of the delivery terms. Koreska v. United Cargo Corp., 23 A.D.2d 37 (1st Dep't 1965).

3. Practice and procedure.

Wife was entitled to judgment as matter of law in conversion action against warehouseman, where warehouseman delivered household goods and other personal property to husband's father upon forged written authorization in wife's name, but without requiring production of non-negotiable warehouse receipt issued by warehouseman upon deposit of goods, and where it was expressly agreed in warehouse receipt, the contract between the parties, that receipt had to be produced before delivery of goods to depositor or transfer of goods to another person. Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).

Where cargo was properly loaded in good condition, and where there was failure of carrier to explain certain facts in the record, owner of goods made a prima facie case of carrier liability; because carrier failed to prove safe delivery of goods to primary carrier, common-law rule limiting liability of connecting carriers cannot operate to rebut owner's prima facie case. Marks Mfg. Co. v. New York Cent. R.R., 448 F.2d 68 (6th Cir. Mich. 1971).

4. —Burden of proof.

Section 7-403's rule placing burden on warehouseman to establish lawful excuse for refusal or failure to deliver goods on demand relied upon in decision establishing rule placing burden on bailee in all bailment for hire cases to prove that he exercised due care to prevent property's loss or destruction. Knowles v. Gilchrist Co., 362 Mass. 642, 289 N.E.2d 879 (1972).

Bailor has burden of proving bailee's negligence which caused loss or damage to bailed goods. Rosen v. Village Chevrolet, Inc., 63 Misc. 2d 174 (1970).

Under the provisions of this section the warehouseman has the burden of explanation for any loss or disappearance of the property bailed with him. National Dairy Prods. Corp. v. Lawrence Am. Field Warehousing Corp., 22 A.D.2d 420 (1st Dep't 1965), rev'd on other grounds, Procter & Gamble Distributing Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 266 N.Y.S.2d 785, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

II. Pre-Uniform Commercial Code Decisions.

5. Decisions under former Code 1942 § 5019.

Warehouseman has burden of showing lawful excuse for failure to deliver cotton stored and must prove that loss by fire was not due to his negligence. Federal Compress & Whse. Co. v. Coleman, 143 Miss. 620, 109 So. 20 (1926).

6. Decisions under former Code 1942 § 5020.

Persons who bought stolen compress cotton receipts in good faith, and sold cotton represented to another, could not be held by compress for conversion of cotton. Latimer v. Stubbs, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

Where person bought stolen compress cotton receipts in good faith and sold cotton represented by them to another, who also acted in good faith, and compress delivered cotton to buyer, though receipts did not bear indorsement of company to which they had been issued, compress could not recover against person first buying receipts for conversion of cotton, particularly in absence of proof that cotton had been sold by one taking delivery. Latimer v. Stubbs, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

7. Decisions under former Code 1942 § 5022.

The duty of a warehouseman under the statute to take up and cancel negotiable receipts upon the delivery of goods represented by such receipts is an absolute, non-delegable duty, for the nonperformance of which by his agent, the warehouseman is liable, even though the agent's default is negligent, wilful, or even criminal, as where he delivers goods, without cancelation of the receipt, in pursuance to a conspiracy between himself and the agent of a co-operative association which takes such receipts from its stockholders by way of pledge or purchase. American Cotton Coop. Ass'n v. Union

Compress & Whse. Co., 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

Under this statute the question as to whether failure to cancel warehouse receipts on delivery of the goods represented thereby is the proximate cause of a loss incurred by the transferee of the receipt is immaterial, in an action by the transferee against the warehouseman. American Cotton Coop. Ass'n v. Union Compress & Whse. Co., 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

The fact that an agent of a transferee of warehouse receipts knows of, and participates in, a scheme by the warehouseman's agent to defraud the transferee by making deliveries of the goods without cancelation of the receipt, in violation of the statute, does not make the transferee chargeable with knowledge of the fact that the goods were delivered without cancelation of the receipt. American Cotton Coop. Ass'n v. Union Compress & Whse. Co., 193 Miss. 43', 7 So. 2d 537, 139 A.L.R. 1483 (1942).

RESEARCH REFERENCES

ALR. Presumptions and burden of proof or of evidence where goods stored in situation governed by Uniform Warehouse Receipts Act are stolen, or are damaged or lost by fire or water. 13 A.L.R.2d 681.

Shipper's ratification of carrier's unauthorized delivery or misdelivery. 15 A.L.R.2d 807.

Interest on damages for warehouseman's refusal to delivery property. 36 A.L.R.2d 337.

Am Jur. 8A Am. Jur. 2d, Bailments § 225.

13 Am. Jur. 2d, Carriers §§ 417 et seq., 430-432, 443, 448, 449, 451.

15A Am. Jur. 2d, Commercial Code § 35.

78 Am. Jur. 2d, Warehouses § 126 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:341-7:343 (obligation of warehouseman or carrier to deliver; excuses).

CJS. 8 C.J.S., Bailments §§ 90-110, 114, 115, 117.

13 C.J.S., Carriers §§ 380, 396, 397, 399, 400.

80 C.J.S., Shipping § 287 et seq.

93 C.J.S., Warehousemen and Safe Depositaries § 108 et seq.

§ 75-7-404. No liability for good faith delivery pursuant to receipt or bill.

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of the document of title or pursuant to this chapter is not liable for the goods even if:

(1) The person from which the bailee received the goods did not have authority to procure the document or to dispose of the goods; or

(2) The person to which the bailee delivered the goods did not have authority to receive the goods.

SOURCES: Codes, 1942, § 41A:7-404; Laws, 1966, ch. 316, § 7-405; Laws, 2006, ch. 527, § 27; Laws, 2007, ch. 355, § 26; Laws, 2007, ch. 381, § 26, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 26 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 26 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 26 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

II. Pre-Uniform Commercial Code Decisions.

2. In general.

I. Under Current Law.

1. In general.

Wife was entitled to judgment as matter of law in conversion action against warehouseman, where warehouseman delivered household goods and other personal property to husband's father upon forged written authorization in wife's name, but without requiring production of non-negotiable warehouse receipt issued by warehouseman upon deposit of goods, and where it was expressly agreed in warehouse receipt, the contract between the parties, that receipt had to be produced before delivery of goods to depositor or transfer of goods to another person. Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).

Section referred to as example of explicit requirement that party exercise more than "honesty in fact." Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

II. Pre-Uniform Commercial Code Decisions.

2. In general.

Where person bought stolen compress cotton receipts in good faith and sold cotton represented by them to another, who also acted in good faith, and compress delivered cotton to buyer, though receipts did not bear indorsement of company to which they had been issued, compress could not recover against person first buying receipts for conversion of cotton, particularly in absence of proof that cotton had been sold by one taking delivery. Latimer v. Stubbs, 173 Miss. 436, 159 So. 857 (1935), set aside, 173 Miss. 448, 161 So. 869 (1935).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 432, 444.

78 Am. Jur. 2d, Warehouses §§ 126, 127.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:351(effect of good faith delivery pursuant to terms).

CJS. 8 C.J.S., Bailments §§ 100-113, 116.

13 C.J.S., Carriers §§ 396, 397, 399, 400.

80 C.J.S., Shipping §§ 279-284, 285 et seq.

93 C.J.S., Warehousemen and Safe Depositaries § 108 et seq.

PART 5.

WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

SEC.
75-7-501. Rules applicable to negotiable tangible document of title; rules applicable to negotiable electronic document of title.
75-7-502. Rights acquired by due negotiation.
75-7-503. Document of title to goods defeated in certain cases.

75-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.
75-7-505. Indorser not a guarantor for other parties.
75-7-506. Delivery without indorsement; right to compel indorsement.
75-7-507. Warranties on negotiation or delivery of document of title.
75-7-508. Warranties of collecting bank as to documents.
75-7-509. Receipt or bill: when adequate compliance with commercial contract.

§ 75-7-501. Rules applicable to negotiable tangible document of title; rules applicable to negotiable electronic document of title.

(a) The following rules apply to a negotiable tangible document of title:

(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

(2) If the document's original terms run to bearer, it is negotiated by delivery alone.

(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person as well as delivery.

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Endorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.

SOURCES: Codes, 1942, § 41A:7-501; Laws, 1966, ch. 316, § 7-501; Laws, 2006, ch. 527, § 28; Laws, 2007, ch. 355, § 27; Laws, 2007, ch. 381, § 27, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 27 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 27 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of section 27 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Editor's Note — In Laws of 2006, ch. 527, § 28, (1)(e), the phrase "A document duly negotiated" should read "A document is duly negotiated." The word "is" was erroneously omitted.

Cross References — When title under warehouse receipt defeated, see § 75-7-205.

Rights acquired by holder on negotiation of document of title, see § 75-7-502.

Right in goods against person having interest before issuance of document of title, see § 75-7-503.

Endorsement as not imposing liability for default by bailee or previous endorsers, see § 75-7-505.

Right of transferee to require transferor to supply necessary endorsement, see § 75-7-506.

Warranties of transferor of document of title, see § 75-7-507.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Farm warehouse receipts, see § 75-43-11.

Grain warehouse receipts, see §§ 75-44-3, 75-44-49 through 75-44-63.

JUDICIAL DECISIONS

I. Under Current Law.
1. In general.
II. Pre-Uniform Commercial Code Decisions.
2. Decisions under former Code 1942 § 5048.
3. Decisions under former Code 1942 § 5051.
4. Decisions under former Code 1942 § 7780.

I. Under Current Law.

1. In general.

Warehouse receipts providing that on return thereof one bale of cotton would be delivered to "above named depositor or its order, or bearer" were negotiable as bearer documents of title under UCC § 7-104(1)(a), as against contention that if both "order" language and "bearer" language appeared on face of such instruments they would be nonnegotiable, and such receipts were "duly negotiated" to holders thereof within meaning of UCC § 7-501(4) where no evidence was produced to show that holders had not paid value for receipts, or that transaction was not in regular course of business, or that holders had had actual notice of any claims to receipts or had not acted in good faith. R.E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

In action by cotton farmers to enjoin defendants from removing 1,640 bales of cotton from warehouse of one defendant, where evidence showed that plaintiffs had sold warehouse receipts representing such cotton to buyer who paid for receipts by subsequently dishonored checks, and that such buyer later sold receipts to defendants who were unaware that plaintiffs had not been paid therefor, temporary injunction issued by trial court would be dissolved for failure of plaintiffs to establish probable right of recovery, since such receipts were negotiable as bearer paper under UCC § 7-104(1)(a) and UCC § 7-501(2)(a) and had been duly negotiated to defendants in compliance with UCC § 7-501(4), so as to give defendants under UCC § 7-502(b) title to cotton represented by receipts. R.E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472 (Tex. Civ. App. 1977), ref. n.r.e (Oct. 19, 1977).

Bank did not acquire fraudulent warehouse receipts in good faith and without notice of fraud where experienced bank officers should have known from warehouse manager's excuse for wanting to exchange fraudulent receipts for valid receipts in bank's possession, i.e., that warehouse inspector was at warehouse demanding to see valid receipts, that there was insufficient grain to back up fraudulent receipts. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Where government agency had reason to know of lien on cotton, had made no inquiry as to existence of lien beyond inquiring of tenant, and where information that land was leased was readily available, warehouse receipts covering cotton grown on land were not "duly negotiated" to government agency so as to cut off landlord's lien. Cleveland v. McNabb, 312 F. Supp. 155 (W.D. Tenn. 1970).

Common carrier becomes owner and holder of bill of lading by seller's delivery and indorsement thereof. Eazor Exp., Inc. v. Lanza, 60 Misc. 2d 686 (1969).

II. Pre-Uniform Commercial Code Decisions.

2. Decisions under former Code 1942 § 5048.

Where cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton which is not carried out, and good-faith purchaser of receipts for value without notice are both innocent, cotton owner, as the one reposing trust and confidence in another, should be required to bear the loss. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner intrusted negotiable warehouse receipts, payable to bearer, and samples of cotton to another for use in proposed sale of cotton to cotton buyer with whom owner customarily dealt, owner thereby vested holder of receipts with every indicia of ownership, and, on holder's sale of receipts to a different buyer without knowledge of owner, buyer, who purchased receipts in good faith for value and without notice, became rightful owner of receipts and of cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

That party obtaining possession from cotton owner of negotiable warehouse receipts, payable to bearer, was guilty of a larceny by fraud in falsely representing that he wished to use them in proposed sale of cotton to cotton buyer with whom owner customarily dealt, did not preclude another cotton buyer, to which receipts were sold by holder, from becoming legal owner of receipts and of cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

The rule that when trustee has invested trust property or its proceeds in any other property into which it can be distinctly traced, cestui que trust may follow it into new investment, unless interest of bona fide purchaser for value has intervened, authorizes pledgee of negotiable warehouse receipts payable to bearer to follow proceeds of receipts which were surrendered to pledgors for benefit of pledgee, into cashier's check, payment of which was intercepted by injunctive process based on asserted rights to proceeds. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody has been intrusted by owner. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts could not prevail against a prior pledgee or purchaser of receipts for value without notice, where at time of promise owner's rights to negotiate receipts had been lost, by valid negotiation thereof by one to whom possession of receipts had been intrusted. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw negotiable warehouse receipts payable to bearer under agreement to sell receipts for pledgee's account, pledgee did not lose superiority of its lien over rights of owner who had originally intrusted possession of receipts to pledgors, unless surrender of receipts by pledgee resulted in subsequent negotiation to a purchaser in good faith for value. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Where pledgors regained possession and control of negotiable warehouse receipts payable to bearer under agreement to sell them for pledgee's account, purchaser of receipts from pledgors acquired absolute title thereto as against both owner who did not authorize pledge, and pledgee. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody of receipt has been intrusted by owner, if at time of such intrusting, receipt may be negotiated by delivery, and person to whom receipt is negotiated acquires such title to goods as person negotiating receipt and depositor of goods or person to whose order they were to be delivered by terms of receipt had or had ability to convey to purchaser in good faith for value. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

3. Decisions under former Code 1942 § 5051.

The Uniform Warehouse Receipts Act, as adopted and still in force in Mississippi, does not permit a receipt to be negotiated by anyone except the owner, or person to whom the owner has entrusted possession of the receipt, and the act does not permit a trespasser, a finder, or thief to pass any title to the receipt. St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co., 254 Miss. 598, 181 So. 2d 913 (1966).

Since warehouse receipts were not negotiable at common law, their negotiability is to be measured by our statutes. Lineburger Bros. v. Hodge, 212 Miss. 204, 54 So. 2d 268 (1951).

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. Lineburger Bros. v. Hodge, 212 Miss. 204, 54 So. 2d 268 (1951).

That agent of purchaser of negotiable warehouse receipts, payable to bearer, knew that holder, who had obtained possession thereof by false statements, had previously been employed by cotton buyers furnished no reason for believing that holder had not been buying cotton and was not authorized to sell receipts. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner intrusted negotiable warehouse receipts, payable to bearer, and samples of cotton to another for use in proposed sale of cotton to another for use in proposed sale of cotton to cotton buyer with whom owner customarily dealt, owner thereby vested holder of receipts with every indicia of ownership, and, on holder's sale of receipts to a different buyer without knowledge of owner, buyer, who purchased receipts in good faith for value and without notice, became rightful owner of receipts and of cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

That party obtaining possession from cotton owner of negotiable warehouse receipts, payable to bearer, was guilty of a larceny by fraud in falsely representing that he wished to use them in proposed sale of cotton to cotton buyer with whom owner customarily dealt, did not preclude another cotton buyer, to which receipts were sold by holder, from becoming legal owner of receipts and of cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Where cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton which is not carried out, and good-faith purchaser of receipts for value without notice are both innocent, cotton owner, as the one reposing trust and confidence in another, should be required to bear the loss. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Negotiable warehouse receipts payable to bearer may be negotiated by mere delivery, by any person to whom custody has been intrusted by owner. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

The evidence showed that cotton grower intrusted to cotton factors possession and custody of negotiable warehouse receipts payable to bearer within statute providing that negotiable receipt may be negotiated by owner or by any person to whom possession or custody of receipt has been intrusted by owner, and that receipts were in such form that they could be negotiated by cotton factors by delivery. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Where tenant ginned and stored in a compress and took warehouse receipts for cotton on which there was a landlord's lien, and the receipts were replevied by bank which then obtained possession of and converted the cotton, such facts did not constitute tenant agent of the landlord so as to estop the landlord from asserting his lien. Campbell v. Farmers' Bank, 127 Miss. 668, 90 So. 436 (1922).

4. Decisions under former Code 1942 § 7780.

In such case it was a question for the jury as to whether stipulation was complied with. Pickle v. Receivers of St. Louis & S.F.R. Co., 115 Miss. 322, 75 So. 448 (1917).

Bill of lading providing shipper must give notice to general officer within 24 hours after stock reached destination, as condition precedent to injuries to stock, complied with by substantial compliance with its terms and could be waived by station agent. New Orleans & N.E.R. Co. v. Wood, 112 Miss. 614, 73 So. 615 (1917).

This section does not apply to interstate shipments. Southern Ry. v. North State Cotton Co., 107 Miss. 71, 64 So. 965 (1914).

This section does not deprive carrier of property without due process, nor does it regulate interstate commerce. Yazoo & Miss. V. Ry. v. G.W. Bent & Co., 94 Miss. 681, 47 So. 805 (1908).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers § 338 et seq.

15A Am. Jur. 2d, Commercial Codes § 52 et seq.

78 Am. Jur. 2d, Warehouses § 38 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:361-7:363 (form of negotiation; requirements of "due negotiation").

CJS. 13 C.J.S., Carriers §§ 384-389.

80 C.J.S., Shipping § 278.

93 C.J.S., Warehousemen and Safe Depositaries §§ 39, 45-72.

§ 75-7-502. Rights acquired by due negotiation.

(a) Subject to Sections 75-7-205 and 75-7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) Title to the document;

(2) Title to the goods;

(3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this chapter. In the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to Section 75-7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

(1) The due negotiation or any prior negotiation constituted a breach of duty;

(2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or

(3) A previous sale or other transfer of the goods or document has been made to a third person.

SOURCES: Codes, 1942, § 41A:7-502; Laws, 1966, ch. 316, § 7-502; Laws, 2006, ch. 527, § 29; Laws, 2007, ch. 355, § 28; Laws, 2007, ch. 381, § 28, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 28 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 28 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 28 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Sufficient identification on sale of share in fungible goods, see § 75-2-105(4).

Title acquired by purchaser of goods, see § 75-2-403.

Right of financing agency to stop delivery of goods, see § 75-2-506.

Seller's stoppage of delivery, see § 75-2-705.

Application of treaty, statute, tariff, or regulation, see § 75-7-103.

Buyer of fungible goods as taking free of claim under negotiated warehouse receipt, see § 75-7-205.

Excuse for bailee's failure to deliver goods to person entitled under document, see § 75-7-403.

When no rights conferred by document of title, see § 75-7-503.

Court's order for delivery of goods or issuance of substitute document where document lost, stolen or destroyed, see § 75-7-601.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

II. Pre-Uniform Commercial Code Decisions.

2. Decisions under former Code 1942 § 5052.
3. Decisions under former Code 1942 § 5058.
4. Decisions under former Code 1942 § 5061.
5. Decisions under former Code 1942 § 7880.

I. Under Current Law.

1. In general.

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and 7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. Citizens Bank & Trust Co. v. SLT Whse. Co., 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. Ga. 1975).

II. Pre-Uniform Commercial Code Decisions.

2. Decisions under former Code 1942 § 5052.

Where cotton warehouse receipts were Mississippi contracts, the theft of the receipts occurred in that state, the cotton was stored in Mississippi and was released under Mississippi law on duplicate receipts, the law of Mississippi was applicable rather than the law of Tennessee, the state in which the stolen warehouse receipts were sold. Craig v. Columbus Compress & Whse. Co., 210 So. 2d 645 (Miss. 1968).

The Uniform Warehouse Receipts Act, as adopted and still in force in Mississippi, does not permit a receipt to be negotiated by anyone except the owner, or person to whom the owner has entrusted possession of the receipt, and the act does not permit a trespasser, a finder, or thief to pass any title to the receipt. St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co., 254 Miss. 598, 181 So. 2d 913 (1966).

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. Lineburger Bros. v. Hodge, 212 Miss. 204, 54 So. 2d 268 (1951).

Cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton, which is not carried out, should bear loss, as against good-faith purchaser of receipts for value, without notice. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Purchaser of warehouse receipts, payable to bearer, from holder, in good faith for value and without notice, became rightful owner of receipts and cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

That holder of receipts was guilty of larceny did not preclude buyer from becoming legal owner of receipts and cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Bona fide purchaser for value of warehouse receipts does not acquire title, under Warehouse Receipts Act, when he purchases from mere trespasser. Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

The warehouse company holds the property for the holder of the receipt and must account to him therefor. A.K. Burrow & Co. v. Planters' Oil Mill & Gin Co., 138 Miss. 284, 103 So. 9 (1925).

Holder of a negotiable warehouse receipt acquires such title to the goods as the person negotiating it had the ability to convey, and the warehouseman owes such holder the same duty as if the receipt had been issued to him directly. Love v. People's Compress Co., 137 Miss. 622, 102 So. 275 (1924).

3. Decisions under former Code 1942 § 5058.

Where cotton was stolen from a gin and taken to the warehouse and warehouse receipts were issued in three fictitious names and later sold to innocent persons, the cotton belonged to the planters rather than to the innocent purchasers of the warehouse receipts. Lineburger Bros. v. Hodge, 212 Miss. 204, 54 So. 2d 268 (1951).

Cotton owner delivering negotiable warehouse receipts, payable to bearer, to another for use in proposed sale of cotton, which is not carried out, should bear loss, as against good-faith purchaser of receipts for value, without notice. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

Purchaser of warehouse receipts, payable to bearer, from holder, in good faith for value and without notice, became rightful owner of receipts and cotton. Weil

Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

That holder of receipts was guilty of larceny did not preclude buyer from becoming legal owner of receipts and cotton. Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938).

The pledgee of negotiable warehouse receipts payable to bearer acquired a lien superior to any rights of cotton grower who had surrendered possession and custody of receipts to pledgors under such circumstances as to clothe pledgors with indicia of ownership and enable them to negotiate receipts to a bona fide purchaser for value, notwithstanding negotiation of receipts by pledgors was fraudulent or a breach of duty. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts, could not prevail against a prior pledgee or purchaser of receipts for value without notice, where owner's right to negotiate receipts had been lost by valid negotiation on part of one intrusted with them. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw receipts payable to bearer under agreement to sell for pledgee's account, pledgee did not lose superiority of lien over rights of owner who had intrusted possession to pledgors, unless surrender by pledgee resulted in subsequent negotiation to purchaser in good faith for value. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Rights of owner, subordinated to those of pledgee of receipts, held not restored by pledgors' sale of receipts to innocent purchaser and delivery of proceeds in form of cashier's check to owner. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

4. Decisions under former Code 1942 § 5061.

Plaintiff's acceptance of a receipt for certain goods when he knew that a portion of them were missing did not prevent recovery by plaintiff from warehouseman for shortages of goods, the circumstances being such that the unlawful act was not the source of plaintiff's civil rights. Lawrence Whse. Co. v. Nasif, 219 F.2d 536 (5th Cir. 1955).

5. Decisions under former Code 1942 § 7880.

Provision in bill of lading that carrier shall have benefit of insurance on lost or damaged property held valid. Yazoo & Miss. V. Ry. v. Blum, 124 Miss. 318, 86 So. 805 (1921).

Acceptance of freight is prima facie evidenced by bill of lading. Yazoo & Miss. V. Ry. v. Nichols & Co., 120 Miss. 690, 83 So. 5 (1919), aff'd, 256 U.S. 540, 41 S. Ct. 549, 65 L. Ed. 1081 (1921).

Bill of lading construed most strongly against carrier. Yazoo & Miss. V. Ry. v. G.W. Bent & Co., 94 Miss. 681, 47 So. 805 (1908).

Bill of lading describing shipment of cotton as containing designated number of pounds held conclusive on carrier, though above column of weights are words "weight subject to correction." Yazoo & Miss. V. Ry. v. G.W. Bent & Co., 94 Miss. 681, 47 So. 805 (1908).

The statute makes a bill of lading issued by a common carrier conclusive evidence in favor of a bona fide holder as against the carrier receiving the property that the carrier received the property. Illinois Cent. R.R. v. Lancashire Ins. Co., 79 Miss. 114, 30 So. 43 (1901).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 13 Am. Jur. 2d, Carriers §§ 338 et seq., 350.

18 Am. Jur. 2d, Conversion § 20.

78 Am. Jur. 2d, Warehouses §§ 45, 50 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:371, 7:372 (rights acquired by due negotiation).

CJS. 8 C.J.S., Bailments §§ 117, 118.

13 C.J.S., Carriers §§ 384-390.

80 C.J.S., Shipping § 278.

93 C.J.S., Warehousemen and Safe Depositaries §§ 39, 45-72.

§ 75-7-503. Document of title to goods defeated in certain cases.

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

(1) Deliver or entrust the goods or any document covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell; with power to obtain delivery under Section 75-7-403; or with power of disposition under Sections 75-2-403, 75-2A-304(2), 75-2A-305(2), or 75-9-320 or other statute or rule of law; or

(2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to which a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under Section 75-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.

(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, delivery by the carrier in accordance with Part 4 of this chapter pursuant to its own bill of lading discharges the carrier's obligation to deliver.

SOURCES: Codes, 1942, § 41A:7-503; Laws, 1966, ch. 316, § 7-503; Laws, 2001, ch. 495, § 16; Laws, 2006, ch. 527, § 30; Laws, 2007, ch. 355, § 29; Laws, 2007, ch. 381, § 29, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 29 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 29 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 29 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Buyer of fungible goods as taking free of claim under warehouse receipt, see § 75-7-205.

Restriction on rights acquired under duplicate document of title, see § 75-7-402.

Absence of liability for bailee's good faith delivery in accordance with document of title, see § 75-7-404.

Negotiation of document of title, see § 75-7-501.

Rights acquired where due negotiation absent, see § 75-7-504(1).

When rights of transferee subject to defeat in case of non-negotiable document, see § 75-7-504(2).

Seller's right to stop delivery pursuant to non-negotiable document, see § 75-7-504(4).

Freedom of purchaser of document from lien imposed by judicial process, see § 75-7-603.

Excuse from obligation to deliver immediately, in event of adverse claims, see § 75-7-603.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

II. Pre-Uniform Commercial Code Decisions.

2. In general.

I. Under Current Law.

1. In general.

Absent evidence to indicate that furniture retailer, who held perfected purchase money security interest in stored furniture, delivered or entrusted furniture to debtor's wife with actual or apparent authority to store furniture, or any evidence which would indicate that retailer acquiesced in procurement by debtor's wife of any document of title, under UCC §§ 9-310, 7-209, and 7-503, security interests of furniture retailer took priority over warehouseman's subsequent lien for storage charges. K Furn. Co. v. Sanders Transf. & Storage Co., 532 S.W.2d 910 (Tenn. 1975).

Where bailor stored furniture with company which went out of business and bailee, without any notification to bailor, made agreement with warehouseman to move stored goods and to store them in bailee's agent's name under nonnegotiable warehouse receipt, bailor was not liable for moving or storage charges where, under UCC §§ 7-209, 7-503, and 7-403, warehousemen did not have enforceable warehouse lien against property. Nikolas v. Patrick, 51 Mich. App. 561, 215 N.W.2d 715 (1974).

Feed mill operator leased storage facilities to bonded warehouseman which issued warehouse receipt covering stored grain to bank; held, bank had rights superior to those of farmers who had sold some grain to mill operator and had stored other grain and who had levied attachment on grain stored by mill operator but under warehouseman's control. Lofton v. Mooney, 452 S.W.2d 617 (Ky. 1970).

II. Pre-Uniform Commercial Code Decisions.

2. In general.

Landlord's lien on agricultural products as security for unpaid rent is paramount to rights of purchaser of warehouse receipts for product issued in tenant's name in absence of proof that tenant has dealt honestly with his landlord. Phillips v. Box, 204 Miss. 231, 37 So. 2d 266 (1948).

Waiver of landlord's lien in favor of purchaser of warehouse receipts for product, issued in tenant's name, is not shown by evidence that landlord accepted farm equipment as part payment of rent and offered to accept tenant's notes for balance, which offer tenant ignored and had cotton crop ginned, baled and placed in warehouse, taking warehouse receipts in his own name and selling warehouse receipts, all without knowledge of landlord who attached cotton promptly after locating it in warehouse. Phillips v. Box, 204 Miss. 231, 37 So. 2d 266 (1948).

Pledgee of negotiable warehouse receipts payable to bearer may follow proceeds of receipts which were surrendered to pledgors for benefit of pledgee, into cashier's check, payment of which was intercepted by injunctive process based on asserted rights to proceeds. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

An alleged lien by virtue of cotton owner's promise to deliver negotiable warehouse receipts, could not prevail against a prior pledgee or purchaser of receipts for value without notice, where owner's right to negotiate receipts had been lost by valid negotiation on part of one intrusted with them. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

By permitting pledgors to withdraw receipts payable to bearer under agreement to sell for pledgee's account, pledgee did not lose superiority of lien over rights of owner who had intrusted possession to pledgors, unless surrender by pledgee resulted in subsequent negotiation to purchaser in good faith for value. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Where pledgors regained possession of receipts under agreement to sell for pledgee's account, purchaser acquired absolute title as against owner and pledgee. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Rights of owner, subordinated to those of pledgee of receipts, held not restored by pledgors' sale of receipts to innocent purchaser and delivery of proceeds in form of cashier's check to owner. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

A cotton owner's release of cotton at time when he had no notice of rights of pledgee of negotiable warehouse receipts payable to bearer did not constitute such consideration or value as would make owner a purchaser for value, where after loss of his rights in cotton to pledgee, owner's release was ineffective as against pledgee, and warehouse company could have been required to surrender cotton to pledgee or other purchaser in good faith for value. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

The pledgee of negotiable warehouse receipts payable to bearer acquired a lien superior to any rights of cotton grower who had surrendered possession and custody of receipts to pledgors under such circumstances as to clothe pledgors with indicia of ownership and enable them to negotiate receipts to a bona fide purchaser for value, notwithstanding negotiation of receipts by pledgors was fraudulent or a breach of duty. Lundy v. Greenville Bank & Trust Co., 179 Miss. 282, 174 So. 802 (1937).

Evidence held not to warrant finding that landlord clothed tenant with indicia of ownership of cotton, or was negligent, or lacking in vigilance, so as to be estopped from asserting lien on cotton as against bona fide purchasers of negotiable warehouse receipts, issued in name of tenant, for cotton. Tennessee Joint Stock Land Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).

Breach of agreement between landlord and tenants regarding storage of cotton covered by mortgage and rent and supply liens in favor of landlord, with knowledge of landlord, held not waiver by landlord of rights under mortgage so as to vest title to cotton in tenants or authorize tenants to convey to purchasers in good faith for value by sale of cotton and delivery of negotiable warehouse receipts. Schmitt v. Federal Compress & Whse. Co., 169 Miss. 589, 153 So. 815 (1934).

Buyers of cotton covered by negotiable warehouse receipts issued to tenants who raised cotton and stored it held to have acquired such title to cotton as tenants had or had ability to transfer to buyers in good faith for value. Schmitt v. Federal Compress & Whse. Co., 169 Miss. 589, 153 So. 815 (1934).

Where cotton stored in warehouse by tenants and covered by negotiable warehouse receipts was incumbered by mortgage and rent and supply liens in favor of landlord, tenants held to have no title to cotton which they could convey to purchasers in good faith for value through sale of cotton and delivery of warehouse receipts. Schmitt v. Federal Compress & Whse. Co., 169 Miss. 589, 153 So. 815 (1934).

Where cotton covered by mortgage and rent and supply liens in favor of landlord was stored in warehouse by one tenant and negotiable warehouse receipts issued to him, sale of cotton by tenants and delivery of warehouse receipts to buyers in good faith for value held not to give buyers title superior to landlord's title under mortgage and liens, where transaction between landlord and tenants did not show that landlord intrusted tenants with indicia of ownership. Schmitt v. Federal Compress & Whse. Co., 169 Miss. 589, 153 So. 815 (1934).

Breach of agreement between landlord and tenants regarding storage of cotton covered by mortgage and rent and supply liens in favor of landlord, with knowledge of landlord, held not waived by landlord of rights under mortgage and liens so as to authorize tenants to convey to purchasers in good faith for value by sale of cotton and delivery of negotiable warehouse receipts. Schmitt v. Federal Compress &

Whse. Co., 169 Miss. 589, 153 So. 815 (1934).

RESEARCH REFERENCES

ALR. Title to goods, as between purchaser from, and one who entrusted them to, auctioneer. 36 A.L.R.2d 1362.

Am Jur. 13 Am. Jur. 2d, Carriers § 432.

67 Am. Jur. 2d, Sales §§ 406, 410, 412, 423, 424, 428, 429, 435.

78 Am. Jur. 2d, Warehouses §§ 45, 50 et seq., 51, 55 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:381-7:383 (rights acquired by due negotiation; defeat of document of title).

CJS. 8 C.J.S., Bailments § 43.

13 C.J.S., Carriers § 380.

80 C.J.S., Shipping §§ 278-284.

93 C.J.S., Warehousemen and Safe Depositaries § 45 et seq.

§ 75-7-504. Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a nonnegotiable document of title, until, but not after, the bailee receives notice of the transfer, the rights of the transferee may be defeated:

(1) By those creditors of the transferor that could treat the transfer as void under Section 75-2-402 or 75-2A-308;

(2) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights;

(3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or

(4) As against the bailee, by good faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under Section 75-2-705 or a lessor under Section 75-2A-526, subject to the requirements of due notification in those sections. A bailee honoring the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense.

SOURCES: Codes, 1942, § 41A:7-504; Laws, 1966, ch. 316, § 7-504; Laws, 2006, ch. 527, § 31; Laws, 2007, ch. 355, § 30; Laws, 2007, ch. 381, § 30, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 30 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 30 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 30 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Title acquired by purchaser of goods, see § 75-2-403.

Instructions for alteration of goods' destination, see § 75-7-303.

Excuse for bailee's failure to fulfill obligation to deliver, see § 75-7-403.

Transferee's right to endorsement of negotiable document, see § 75-7-506.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

In interpleader action by bailee of zinc, where evidence showed (1) that bailor, who had stored 300 tons of zinc with bailee, ordered bailee to release all of it to bailor's purchaser, (2) that bailor's purchaser then sold such zinc to alleged bona-fide subpurchaser and ordered bailee to release zinc to subpurchaser, (3) that after bailee had delivered 40 tons to subpurchaser, bailor learned of original purchaser's insolvency and ordered bailee to stop delivery to original purchaser, and (4) that on the same day, subpurchaser also ordered bailee to deliver remainder of such zinc (260 tons) to it, district court denied bailor's motion for summary judgment on its alleged right under UCC §§ 7-504(4) and § 2-705(1) and (2) to stop delivery of zinc, since (1) bailor failed to show, within meaning of UCC § 2-705(2)(b), that bailee had not acknowledged that it was holding the zinc for the subpurchaser, and (2) bailor also had failed to show, within meaning of UCC § 2-705(2)(d), that there had been no negotiation to subpurchaser of any negotiable document of title covering the zinc. Ceres Inc. v. ACLI Metal & Ore Co., 451 F. Supp. 921 (N.D. Ill. 1978).

Bank did not acquire fraudulent warehouse receipts in good faith and without notice of fraud where experienced bank officers should have known from warehouse manager's excuse for wanting to exchange fraudulent receipts for valid receipts in bank's possession, i.e., that warehouse inspector was at warehouse demanding to see valid receipts, that there was insufficient grain to back up fraudulent receipts. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Buyer's drafts, which described purchased beans by kind and quantity, vested title to beans in buyer under UCC § 7-504, where drafts were documents of title and represented sale of beans of type in which seller had title. Bank, which took possession of seller's assets as secured creditor for purpose of liquidating seller's business, gained no right to these beans by means of its security interest in the inventory of seller, where the beans represented by the warehouse receipt found in seller's safe were in possession of a third party and bank failed to perfect security interest as required by UCC § 9-304 in warehouse receipt. Midland Bean Co. v. Farmers State Bank, 37 Colo. App. 452, 552 P.2d 317 (1976).

In action by bank against warehouse company arising as result of shortages in amount of grain represented by non-negotiable warehouse receipts which bank had taken as collateral for loans made by it to bailor to whom receipts had been issued by company, under UCC §§ 7-502 and 7-504 there could be no due negotiation of non-negotiable warehouse receipts and bank could obtain no greater rights than bailor (who had no authority to convey any rights in grain); nor was warehouse company liable to bank for shortage under UCC § 7-204 where it was not negligent in its operation or maintenance of warehouse and bailor used illegal means to take grain from warehouse totally without defendant's knowledge or authority. Citizens Bank & Trust Co. v. SLT Whse. Co., 368 F. Supp. 1042 (M.D. Ga. 1974), aff'd, 515 F.2d 1382 (5th Cir. Ga. 1975).

RESEARCH REFERENCES

ALR. What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person. 4 A.L.R.2d 213.

Effectiveness, as pledge, of transfer of nonnegotiable instruments which represent obligation. 53 A.L.R.2d 1396.

Am Jur. 6 Am. Jur. 2d, Attachments and Garnishment § 68.

13 Am. Jur. 2d, Carriers §§ 336, 338 et seq., 416.

67 Am. Jur. 2d, Sales §§ 428, 429, 435.

78 Am. Jur. 2d, Warehouses §§ 45, 50 et seq., 51, 55 et seq., 57 et seq., 64 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:391 et seq. (rights acquired in absence of due negotiation; diversion; seller's stoppage of delivery).

CJS. 8 C.J.S., Bailments § 43.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping §§ 275-284.

93 C.J.S., Warehousemen and Safe Depositaries §§ 39, 45-72.

§ 75-7-505. Indorser not a guarantor for other parties.

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

SOURCES: Codes, 1942, § 41A:7-505; Laws, 1966, ch. 316, § 7-505; Laws, 2006, ch. 527, § 32, eff from and after July 1, 2006.

Cross References — Rights acquired by holder of duly negotiated document, see § 75-7-502.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 340, 345, 346.

78 Am. Jur. 2d, Warehouses §§ 45, 48, 50.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:431 (indorsement; document issued by bailee).

CJS. 8 C.J.S., Bailments §§ 100-117.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping §§ 275-284.

93 C.J.S., Warehousemen and Safe Depositaries §§ 39, 45-72.

§ 75-7-506. Delivery without indorsement; right to compel indorsement.

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied.

SOURCES: Codes, 1942, § 41A:7-506; Laws, 1966, ch. 316, § 7-506; Laws, 2006, ch. 527, § 33, eff from and after July 1, 2006.

Cross References — Excuses for bailee's failure to deliver goods to person entitled under document, see § 75-7-403.

Negotiation of document of title, see § 75-7-501.

Indorser's nonliability for default by bailee or previous indorsers, see § 75-7-505.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 342, 344.

67 Am. Jur. 2d, Sales §§ 406, 410, 412, 423, 424, 428, 429.

78 Am. Jur. 2d, Warehouses §§ 42, 43.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms § 7:441, 7:442 (delivery without indorsement; right to compel indorsement).

CJS. 6A C.J.S., Assignments § 76.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping § 278.

93 C.J.S., Warehousemen and Safe Depositaries §§ 54-64.

§ 75-7-507. Warranties on negotiation or delivery of document of title.

If a person negotiates or delivers a document of title for value, otherwise than as a mere intermediary under Section 75-7-508, unless otherwise agreed, the transferor warrants to its immediate purchaser only in addition to any warranty made in selling or leasing the goods that:

(1) The document is genuine;

(2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and

(3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents.

SOURCES: Codes, 1942, § 41A:7-507; Laws, 1966, ch. 316, § 7-507; Laws, 2006, ch. 527, § 34; Laws, 2007, ch. 355, § 31; Laws, 2007, ch. 381, § 31, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 31 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 31 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 31 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Warranties on sale of goods, see §§ 75-2-312 to 75-2-318.

Collecting bank's warranties, see § 75-7-508.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

When cotton merchant sold nonexistent cotton represented by warehouse receipts to broker, it breached warranty contained in § 7-507. Simon v. Estate of Allen, 497 S.W.2d 800 (Tex. Civ. App. 1973), ref. n.r.e., cert. denied, 419 U.S. 843, 95 S. Ct. 76, 42 L. Ed. 2d 71 (1974).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 340, 345, 346.

67 Am. Jur. 2d, Sales §§ 406, 410, 412, 423, 424, 428, 429.

78 Am. Jur. 2d, Warehouses §§ 48, 59.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:451-7:453 (warranties; on negotiation or transfer).

CJS. 8 C.J.S., Bailments §§ 117-118.

13 C.J.S., Carriers §§ 372-374, 379, 380.

80 C.J.S., Shipping § 278.

93 C.J.S., Warehousemen and Safe Depositaries §§ 54-64.

§ 75-7-508. Warranties of collecting bank as to documents.

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected.

SOURCES: Codes, 1942, § 41A:7-508; Laws, 1966, ch. 316, § 7-508; Laws, 2006, ch. 527, § 35, eff from and after July 1, 2006.

Cross References — Instructions to collecting bank, see § 75-4-203.

Collection of documentary drafts, see §§ 75-4-501 to 75-4-504.

Warranties on negotiation or transfer of document of title, see § 75-7-507.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

1. In general.

UCC § 7-508 specifically limits the warranties of a collecting bank with respect to documents. First Trust & Sav. Bank v. Fidelity-Philadelphia Trust Co., 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Banks and Financial Institutions §§ 967, 969, 980 et seq.

13 Am. Jur. 2d, Carriers § 319.

78 Am. Jur. 2d, Warehouses § 48.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Form 7:461 (warranties of collecting bank.

CJS. 9 C.J.S., Banks and Banking §§ 333, 434, 436-438, 417.

13 C.J.S., Carriers §§ 372-374, 379, 380.

93 C.J.S., Warehousemen and Safe Depositaries §§ 54-64.

§ 75-7-509. Receipt or bill: when adequate compliance with commercial contract.

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by Title 75, Chapter 2, 2A, or 5.

SOURCES: Codes, 1942, § 41A:7-509; Laws, 1966, ch. 316, § 7-509; Laws, 2006, ch. 527, § 36, eff from and after July 1, 2006.

Cross References — Sales, see §§ 75-2-101 et seq.

Formation of sales contract, see §§ 75-2-201 et seq.

Letters of credit, see §§ 75-5-101 et seq.

Formal requirements of letters of credit, see § 75-5-104.

Consideration requisite for letter of credit, see § 75-5-105.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers § 340.

78 Am. Jur. 2d, Warehouses § 75.

6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:1 et seq. (advice of credit; confirmation; risks of transmission and translation or interpretation of message).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:11 et seq. (form, formation, and readjustment of contract).

Part 6.

Warehouse Receipts and Bills of Lading Miscellaneous Provisions.

Sec.

75-7-601. Lost and missing documents of title.

75-7-602. Attachment of goods covered by a negotiable document.

75-7-603. Conflicting claims; interpleader.

§ 75-7-601. Lost and missing documents of title.

(a) If a document of title is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with the order. If the document was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorney's fees in any action under this subsection.

(b) A bailee that without court order delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery which files a notice of claim within one (1) year after the delivery.

SOURCES: Codes, 1942, § 41A:7-601; Laws, 1966, ch. 316, § 7-601; Laws, 2006, ch. 527, § 37; Laws, 2007, ch. 355, § 32; Laws, 2007, ch. 381, § 32, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 32 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 32 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 32 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Cross References — Application of tariffs and classifications to documents of title, see § 75-7-103.

Rights acquired on negotiation of document notwithstanding document's loss, theft, etc., see § 75-7-502(2).

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

Lost, destroyed and stolen securities, see § 75-8-405.

JUDICIAL DECISIONS

1. In general.

This section does not make it mandatory upon a warehouseman to institute suit where an original outstanding receipt has been lost or destroyed. St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co., 254 Miss. 598, 181 So. 2d 913 (1966).

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers §§ 419, 434.

18 Am. Jur. 2d, Conversion § 20.

52 Am. Jur. 2d, Lost and Destroyed Instruments § 7 et seq.

78 Am. Jur. 2d, Warehouses § 136.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:21-7:23 (lost and missing documents of title).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 7 — Documents of Title, § 253:2751 et seq. (lost and missing documents).

CJS. 13 C.J.S., Carriers §§ 372-374, 379, 380.

54 C.J.S., Lost Instruments § 2 et seq.

93 C.J.S., Warehousemen and Safe Depositaries §§ 54-64.

§ 75-7-602. Attachment of goods covered by a negotiable document.

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

SOURCES: Codes, 1942, § 41A:7-602; Laws, 1966, ch. 316, § 7-602; Laws, 2006, ch. 527, § 38, eff from and after July 1, 2006.

Cross References — Attachment at law, see § 11-33-1 et seq.

When document of title confers no right against person having prior interest in goods, see § 75-7-503.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

II. Pre-Uniform Commercial Code Decisions.

2. In general.

I. Under Current Law.

1. In general.

A savings and loan association passbook is not a negotiable instrument within the meaning of this section. American Express Co. v. Vella, 92 N.J. Super. 380, 223 A.2d 515 (1966), aff'd, 94 N.J. Super. 258, 227 A.2d 721 (1967), certification denied, 49 N.J. 364, 230 A.2d 397 (1967).

II. Pre-Uniform Commercial Code Decisions.

2. In general.

Ginner turning over gin receipts received on delivery of cotton to compress waived his lien thereon. Quiver Gin Co. v. Looney, 144 Miss. 709, 111 So. 107 (1927).

Warehouseman who suffers goods to be taken from his possession under a writ of attachment issued in a proceeding to which the holder of the receipt is not a party, without taking up and cancelling the receipt must account to the holder of the receipt for the value of the goods. Love v. People's Compress Co., 137 Miss. 622, 102 So. 275 (1924).

RESEARCH REFERENCES

ALR. Allowance of attorney's fees to party interpleading claimants to funds or property. 48 A.L.R.2d 190.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment § 68.

8A Am. Jur. 2d, Bailments § 64.

78 Am. Jur. 2d, Warehouses §§ 65, 139.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:31-7:36 (attachment of goods covered by negotiable document of title).

2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (proof of wrongful attachment).

CJS. 7 C.J.S., Attachment §§ 216, 229, 230.

§ 75-7-603. Conflicting claims; interpleader.

If more than one (1) person claims title or possession of the goods, the bailee is excused from delivery until the bailee has had a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action.

SOURCES: Codes, 1942, § 41A:7-603; Laws, 1966, ch. 316, § 7-603; Laws, 2006, ch. 527, § 39, eff from and after July 1, 2006.

Cross References — Proceedings when third party claims subject matter, see §§ 11-23-1, 11-23-3.

For applicability to this section of the Laws of 2006, ch. 527 amendments, as amended by Laws of 2007, ch. 381, see § 75-7-701.

RESEARCH REFERENCES

ALR. Allowance of attorneys' fees to party interpleading claimants to funds or property. 48 A.L.R.2d 190.

Am Jur. 8A Am. Jur. 2d, Bailments §§ 189, 190.

13 Am. Jur. 2d, Carriers § 447.

44B Am. Jur. 2d, Interpleader §§ 7, 8, 10, 11, 14.

78 Am. Jur. 2d, Warehouses §§ 137 et seq., 174.

6 Am. Jur. Pl & Pr Forms (Rev), Warehouse Receipts, Forms 7:51-7:54 (conflicting claims; interpleader).

CJS. 48 C.J.S., Interpleader § 13 et seq.

93 C.J.S., Warehousemen and Safe Depositaries § 157.

PART 7.

TRANSITIONAL RULES.

SEC.
75-7-701. Transitional rules.

§ 75-7-701. Transitional rules.

(a) The amendments to this chapter contained in Chapter 527, Laws of 2006, as amended by Chapter 381, Laws of 2007, apply to a document of title that is issued or a bailment that arises on or after July 1, 2006, but do not apply to: (1) a document of title that is issued or a bailment that arises before July 1, 2006, even if the document of title or bailment would be so subject if the document of title had been issued or bailment had arisen after July 1, 2006, or (2) a right of action that has accrued before July 1, 2006.

(b) A document of title issued or a bailment that arises before July 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by Chapter 527, Laws of 2006, as amended by Chapter 381, Laws of 2007, as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute as it existed on June 30, 2006.

SOURCES: Laws, 2006, ch. 527, § 40; Laws, 2007, ch. 355, § 33; Laws, 2007, ch. 381, § 33, eff from and after passage (approved Mar. 15, 2007.)

Joint Legislative Committee Note — Section 33 of ch. 355, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:20 p.m.), amended this section. Section 33 of ch. 381, Laws of 2007, effective upon passage (approved March 15, 2007, at 4:45 p.m.), also amended this section. As set out above, this section reflects the language of Section 33 of ch. 381, Laws of 2007, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Editor's Note — Laws of 2006, ch. 527 amended the following sections in Chapter 7: Sections 75-7-102, 75-7-103, 75-7-104, 75-7-105, 75-7-106, 75-7-201, 75-7-202, 75-7-203, 75-7-204, 75-7-205, 75-7-206, 75-7-207, 75-7-208, 75-7-209, 75-7-210, 75-7-301, 75-7-302, 75-7-303, 75-7-304, 75-7-305, 75-7-307, 75-7-308, 75-7-309, 75-7-401, 75-7-402, 75-7-403, 75-7-404, 75-7-501, 75-7-502, 75-7-503, 75-7-504, 75-7-505, 75-7-506, 75-7-507, 75-7-508, 75-7-509, 75-7-601, 75-7-602, and 75-7-603.

CHAPTER 8

Uniform Commercial Code—Revised Article 8. Investment Securities

Part 1. Short Title and General Matters....75-8-101
Part 2. Issue and Issuer....75-8-201
Part 3. Transfer of Certificated and Uncertificated Securities....75-8-301
Part 4. Registration....75-8-401
Part 5. Security Entitlements....75-8-501

Editor's Note — The following table lists the provisions of Article 8 of Title 75 of the Mississippi Code, as it existed prior to 1996 (under the heading Former Article 8), and the corresponding provisions in Revised Article 8, as enacted in 1996 (under the heading Revised Article 8), which relate to the subject matter of the original provisions of Article 8. Where there is no corresponding provision, the notation "Omitted" appears in the table.

Former Article 8	Revised Article 8
75-8-101	75-8-101
75-8-102	75-8-102
75-8-103	75-8-209
75-8-104	75-8-210
75-8-105	75-8-114
75-8-106	75-8-110
75-8-107	Omitted
75-8-108	Omitted
75-8-201	75-8-201
75-8-202	75-8-202
75-8-203	75-8-203
75-8-204	75-8-204
75-8-205	75-8-205
75-8-206	75-8-206
75-8-207	75-9-207
75-8-208	75-8-208
75-8-301	75-8-302
75-8-302	75-8-102, 75-8-302, 75-8-303
75-8-303	75-8-102
75-8-304	75-8-105
75-8-305	75-8-105
75-8-306	75-8-108, 75-8-306
75-8-307	75-8-304
75-8-308	75-8-102, 75-8-107, 75-8-304, 75-8-305
75-8-309	75-8-304
75-8-310	75-8-304
75-8-311	75-8-304
75-8-312	75-8-306
75-8-313	Omitted
75-8-314	Omitted
75-8-315	Omitted
75-8-316	75-8-307
75-8-317	75-8-112
75-8-318	75-8-115
75-8-319	Omitted
75-8-320	Omitted

Former Article 8	Revised Article 8
75-8-321	Omitted
75-8-401	75-8-401
75-8-402	75-8-402
75-8-403	75-8-403
75-8-404	75-8-404
75-8-405	75-8-405, 75-8-406
75-8-406	75-8-407
75-8-407	Omitted
75-8-408	Omitted

PART 1.

SHORT TITLE AND GENERAL MATTERS.

SEC.
75-8-101. Short title.
75-8-102. Definitions.
75-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.
75-8-104. Acquisition of security or financial asset or interest therein.
75-8-105. Notice of adverse claim.
75-8-106. Control.
75-8-107. Whether indorsement, instruction, or entitlement order is effective.
75-8-108. Warranties in direct holding.
75-8-109. Warranties in indirect holding.
75-8-110. Applicability; choice of law.
75-8-111. Clearing corporation rules.
75-8-112. Creditor's legal process.
75-8-113. Statute of frauds inapplicable.
75-8-114. Evidentiary rules concerning certificated securities.
75-8-115. Securities intermediary and others not liable to adverse claimant.
75-8-116. Securities intermediary as purchaser for value.

§ 75-8-101. Short title.

This chapter may be cited as Uniform Commercial Code—Revised Article 8. Investment Securities.

SOURCES: Laws, 1996, ch. 468, § 2, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-101 [Codes, 1942, § 41A:8-101; Laws, 1966, ch. 316, § 8-101], which provided the short title for this chapter, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-101.

Laws of 1996, ch. 468, §§ 1 and 72, effective July 1, 1996, provide as follows:

"SECTION 1. The purpose of this act is to repeal the chapter of law known as the 'Uniform Commercial Code-Investment Securities' and to recodify replacement versions of that law under the same chapter number in the Mississippi Code of 1972, which provisions are to be known as the 'Uniform Commercial Code—Revised Article 8. Investment Securities.'

"Section 72. (a). This act does not affect an action or proceeding commenced before this act takes effect.

"(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect."

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Bonds of county water, sewer, garbage disposal, and fire protection, see § 19-5-183.

Bonds for improvement, development and maintenance of sixteenth section lands being securities within meaning of this chapter, see § 29-3-169.

Provision that bonds issued by a joint water management district shall be securities within the meaning of Article 8 of the Uniform Commercial Code (§§ 75-8-101 et seq.), see § 51-8-37.

Bonds and interest coupons issued for Bienville Recreational District being securities within meaning of this chapter, see § 55-19-19.

Provisions of the Mississippi Securities Act, generally, see § 75-71-101 et seq.

Bonds issued by municipalities and joint agencies being securities within meaning of this chapter, see § 77-5-739.

Small business investment companies, see § 79-7-1 et seq.

Investment trusts, see § 79-15-1 et seq.

Exchanges authorized, see § 87-1-11.

Who authorized to provide market quotations, see § 87-1-13.

Fiduciary security transfers, see § 91-11-1 et seq.

Comparable Laws from other States — Alabama: Code of Ala. § 7-8-101 et seq
Alaska: Alaska Stat. § 45.08.101 et seq.
Arizona: A.R.S. § 47-8101 et seq.
Arkansas: A.C.A. § 4-8-101 et seq.
California: Cal U Com Code § 8101 et seq.
Colorado: C.R.S. 4-8-101 et seq.
Connecticut: Conn. Gen. Stat. § 42a-8-101 et seq.
Delaware: 6 Del. C. § 8-101 et seq.
District of Columbia: D.C. Code § 28:8-101 et seq.
Florida: Fla. Stat. § 678.1011 et seq.
Georgia: O.C.G.A. § 11-8-101 et seq.
Hawaii: HRS § 490:8-101 et seq.
Idaho: Idaho Code § 28-8-101 et seq.
Illinois: 810 ILCS 5/8-101 et seq.
Indiana: Burns Ind. Code Ann. § 26-1-8-101 et seq.
Iowa: Iowa Code § 554.8101 et seq.
Kansas: K.S.A. § 84-8-101 et seq.
Kentucky: KRS § 355.8-101 et seq.
Louisiana: La. R.S. § 10:8-101 et seq.
Maine: 11 M.R.S. § 8-1101 et seq.
Maryland: Md. COMMERCIAL LAW Code Ann. § 8-101 et seq.
Massachusetts: ALM GL ch. 106, § 8-101 et seq.
Michigan: MCLS § 440.8101 et seq.
Minnesota: Minn. Stat. § 336.8-101 et seq.
Missouri: § 400.8-101 R.S.Mo. et seq.

Montana: 30-8-101, MCA et seq.
Nebraska: R.R.S. Neb. (U.C.C.) § 8-101 et seq.
Nevada: Nev. Rev. Stat. Ann. § 104.8101 et seq.
New Hampshire: RSA 382-A:8-101 et seq.
New Jersey: N.J. Stat. § 12A:8-101 et seq.
New Mexico: N.M. Stat. Ann. § 55-8-101 et seq.
New York: NY CLS UCC § 8-101 et seq.
North Carolina: N.C. Gen. Stat. § 25-8-101 et seq.
North Dakota: N.D. Cent. Code, § 41-08-01 et seq.
Ohio: ORC Ann. 1308.01 et seq.
Oklahoma: 12A Okl. St. § 8-101 et seq.
Oregon: ORS § 78.1010 et seq.
Pennsylvania: 13 Pa.C.S. § 8101 et seq.
Rhode Island: R.I. Gen. Laws § 6A-8-101 et seq.
South Carolina: S.C. Code Ann. § 36-8-101 et seq.
South Dakota: S.D. Codified Laws § 57A-8-101 et seq.
Tennessee: Tenn. Code Ann. § 47-8-101 et seq.
Texas: Tex. Bus. & Com. Code § 8.101 et seq.
Utah: Utah Code Ann. § 70A-8-100 et seq.
Vermont: 9A V.S.A. § 8-101 et seq.
Virgin Islands: 11A V.I.C. § 8-101 et seq.
Virginia: Va. Code Ann. § 8.8A-101 et seq.
Washington: Rev. Code Wash. (ARCW) § 62A.8-101 et seq.
West Virginia: W. Va. Code § 46-8-101 et seq.
Wisconsin: Wis. Stat. § 408.101 et seq.
Wyoming: Wyo. Stat. § 34.1-8-101 et seq.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-8-101.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-101.

6. In general.

Notwithstanding Idaho statutory and common-law principles concerning gifts and the creation of joint tenancies, transfers of investment securities are governed by Article 8 of the Idaho Uniform Commercial Code (UCC §§ 8-101 et seq). However, where Article 8 is silent as to the applicable law, the Idaho court's disposition of a transfer of such securities, under Idaho UCC § 1-103, is governed by principles of law and equity that supplement the provisions of the Idaho Uniform Commercial Code. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Building and Loan Association shares which represent the withdrawal capital account of the association, as distinguished from permanent reserve shares, are not subject to Article 8 of the Code. In re Estate of Morey, 38 Ill. 2d 575, 232 N.E.2d 734 (1967).

Under the Uniform Commercial Code as adopted in Pennsylvania there is no requirement that a contract be evidenced by a single instrument, and if the parties wish, they may express their agreement in more than one writing, and in such circumstances the several documents are to be interpreted together, each one contributing, to the extent of its worth, to the ascertainment of the true intent of the parties, and this rule was held applicable to an agreement for the sale of securities. Stern & Co. v. State Loan & Fin. Corp., 238 F. Supp. 901 (D. Del. 1965).

The Code continues the policy of the Uniform Stock Transfer Act of making the certificate represent the shares of stock. Lesavoy Indus., Inc. v. Pennsylvania Gen. Paper Corp., 404 Pa. 161, 171 A.2d 148 (1961).

Article 8 apparently does not apply to shares represented by certificates issued before the effective date of the Code. Lesavoy Industries, Inc. v. Pennsylvania General Paper Corp. (1961) 404 Pa. 161, 171 A2d 148, in which the court so stated without explaining that the situs of the stock was governed by the Uniform Stock Transfer Act, now embodied in the Code, the policy of which is to make the certificate represent the share of stock. Lesavoy Indus., Inc. v. Pennsylvania Gen. Paper Corp., 404 Pa. 161, 171 A.2d 148 (1961).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 8, dealing with investment securities. 21 A.L.R.3d 964.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 5, 11, 12.

15A Am. Jur. 2d, Commercial Code § 68.

18 Am. Jur. 2d, Corporations §§ 19, 21.

18A Am. Jur. 2d, Corporations §§ 480 et seq., 674 et seq.

Transfer of shares, 7 Am. Jur. Pl & Pr Forms (Rev), Corporations, Forms 91-103.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2771 et seq. (investment securities).

CJS. 18 C.J.S., Corporations §§ 185 et seq., 235 et seq., 285 et seq.

Law Reviews. Vaaler, Symposium on the Uniform Commercial Code: Revised Article 8 of the Mississippi UCC: Dealing Directly With Indirect Holding. 66 Miss. L. J. 249, Winter, 1996.

§ 75-8-102. Definitions.

(a) In this chapter:

(1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) "Bearer form," as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) "Certificated security" means a security that is represented by a certificate.

(5) "Clearing corporation" means:

(i) A person that is registered as a "clearing agency" under the federal securities laws;

(ii) A federal reserve bank; or

(iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) "Communicate" means to:

(i) Send a signed writing; or

(ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of Section 75-8-501(b)(2) or (3), that person is the entitlement holder.

(8) "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) "Financial asset," except as otherwise provided in Section 75-8-103, means:

(i) A security;

(ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter. As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) [Reserved]

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form," as applied to a certificated security, means a form in which:

(i) The security certificate specifies a person entitled to the security; and

(ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

(i) A clearing corporation; or

(ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security," except as otherwise provided in Section 75-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) Which:

(A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) Is a medium for investment and by its terms expressly provides that it is a security governed by this chapter.

(16) "Security certificate" means a certificate representing a security.

(17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this chapter.

(18) "Uncertificated security" means a security that is not represented by a certificate.

(b) Other definitions applying to this chapter and the sections in which they appear are:

Appropriate person	Section 75-8-107
Control	Section 75-8-106
Delivery	Section 75-8-301
Investment company security	Section 75-8-103
Issuer	Section 75-8-201
Overissue	Section 75-8-210
Protected purchaser	Section 75-8-303
Securities account	Section 75-8-501

(c) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

(d) The characterization of a person, business, or transaction for purposes of this chapter does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

SOURCES: Laws, 1996, ch. 468, § 3; Laws, 2010, ch. 506, § 39, eff from and after July 1, 2010.

Editor's Note — A former § 75-8-102 [Codes, 1942, § 41A:8-102; Laws, 1966, ch. 316, § 8-102; 1974, ch. 382; 1990, ch. 384, § 1, from and after July 1, 1990], which defined terms used in this chapter, was repealed by Laws, of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-102.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — For general definitions and principles of construction and interpretation applicable throughout this chapter, see § 75-1-201 et seq.

Code's provisions respecting commercial paper as inapplicable to investment securities, see § 75-3-103(1).

Definition of "documentary draft," see § 75-4-104.

Effect of issuer's restrictions on transfer, see § 75-8-204.

State trust company deposit requirements, see § 81-27-5.301.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-102.

6. In general; "security."
7. —Stock certificate as security.
8. —Stock of closely-held corporation.
9. —Treasury bill as security.
10. —Other "securities."
11. Other terms.

III. Under Former § 75-8-303.

12. "Broker."

IV. Under Former § 75-8-308.

13. Indorsement.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-102.

6. In general; "security."

Certificates of participation in eight promissory notes were not "investment securities" within meaning of UCC Article 8 where such certificates were not issued in "bearer" or "registered form" under UCC § 8-102, and (2) none of such certificates was "one of a class or series or by its terms...divisible into a class or series of instruments" within meaning of UCC § 8-102. Corporacion Venezolana de Fomento v. Vintero Sales Corp. (1978, SD NY) 452 F Supp 1108, 24 UCCRS 1199, remanded without op (CA2 NY) 607 F2d 994. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108, 24 U.C.C. Rep. Serv. 1199 (S.D.N.Y. 1978), remanded without op, 607 F.2d 994 (2d Cir. N.Y. 1979); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979) (applying New York UCC; holding that banks to which such certificates were issued were holders of the underlying promissory notes, rather than owners of investment securities, and that their rights were therefore governed by UCC Article 3).

An instrument can qualify as a "security" under UCC § 8-102, even though it has never been traded on any securities exchange or market. The question under this section of the code is whether a particular instrument "is of a type" that is commonly dealt in on securities exchanges or markets, or "is of a type" that is commonly recognized as a medium for investment in any area in which it is issued or dealt in. E.H. Hinds, Inc. v. Coolidge Bank & Trust Co., 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Creditor who loaned money to debtor to purchase stock in exchange for security interest in stock did not have perfected, secured interest in stock, where stock certificate was not issued to creditor until after bankruptcy filing. Williams v. Indi-Bel, Inc., 167 B.R. 77 (Bankr. N.D. Miss. 1994).

7. —Stock certificate as security.

Stock certificates are "securities" within Code provision conferring negotiability upon securities, administrator of estate of purchaser of stock need not be "record owner" of stock in order to enforce right thereunder. New England Merchants Nat'l Bank v. Old Colony Trust Co., 356 Mass. 612, 254 N.E.2d 891 (1970).

Stock warrants, under Michigan law, are investment securities. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

Article 8 was intended to include all shares of stock and not merely those dealt with by security brokers. Previti v. Rubenstein, 3 U.C.C. Rep. Serv. 882 (1966, NY Sup).

In determining whether certain stock rights were securities within the meaning of the Securities Exchange Act of 1934, the proposed final draft of 1950 of UCC § 8-102, which defined "security", was quoted by the court. Silverman v. Landa, 306 F.2d 422 (2d Cir. N.Y. 1962).

8. —Stock of closely-held corporation.

Stock in close family corporate business which is not type of stock that is commonly traded on securities exchanges or markets, and which also is not commonly recognized by such exchanges or markets as a medium of investment, is not an "investment security" within meaning of

UCC § 8-102. Zamore v. Whitten, 395 A.2d 435, 4 A.L.R.4th 899 (Me. 1978), overruled on other grounds, 595 A.2d 1027 (Me. 1991).

In action for specific performance of contract to purchase stock in closely held corporation, where plaintiff offered in letter to sell stock to defendant and claimed that defendant had orally accepted such offer and then refused to perform, and where defendant denied that he had orally accepted plaintiff's offer and claimed that he had never signed any writing that obligated him to buy such stock and that a writing was required by statute of frauds contained in UCC § 8-319 (dealing with contracts for sale of securities), trial court's granting of summary judgment for defendant, on basis of defendant's affirmative defense of statute of frauds, was reversible error where defendant failed conclusively to prove essential elements of such defense, namely, (1) that subject matter of alleged sale was "securities" as defined in UCC § 8-102, and (2) that there was no written contract to purchase such securities (observing, in connection with defendant's failure to prove as matter of law that stock allegedly sold to him constituted "securities" under UCC § 8-102, that he probably could not have proved such point as a matter of law since the question was one of fact). Kenney v. Porter, 557 S.W.2d 589 (Tex. Civ. App. 1977).

Stock certificates of corporation which had fewer than four stockholders and whose only substantial asset was structure housing two professional offices, were "securities" within meaning of UCC § 8-102; thus, alleged oral agreement among stockholders of corporation which, in effect, conferred upon each of them first refusal rights if any other stockholder wished to sell his stock, was unenforceable under UCC § 8-319. Pantel v. Becker, 89 Misc. 2d 239 (1977).

Where debtor transferred title to his home to corporation of which he was sole stockholder, debtor's stock certificate was not a security as defined by UCC § 8-102 and creditor could not invoke provisions of UCC Article 8 to satisfy debt. Rhode Island Hosp. v. Collins, 117 R.I. 535, 368 A.2d 1225 (1977).

9. —Treasury bill as security.

United States treasury bills are "securities" within meaning of UCC § 8-102. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978) (applying Illinois law).

United States treasury bills are investment securities as defined by UCC § 8-102 and are governed Article 8 and not Article 3. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action against stockbroker for having sold stock held as community property on instructions of plaintiff's former husband and delivered proceeds to him in treasury bills, treasury bills met all requirements of securities under UCC §§ 8-102 and 8-318, negating liability of broker for conversion in sale of securities according to instructions of principal; immunization from liability extended to delivery of proceeds to principal authorizing sale so long as good faith existed on part of broker. Martinez v. Dempsey-Tegeler & Co., 37 Cal. App. 3d 509 (2d Dist. 1974).

10. —Other "securities."

Debentures are "securities" within meaning of UCC § 8-102. E.H. Hinds, Inc. v. Coolidge Bank & Trust Co., 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Corporate notes that were "of a type commonly dealt in upon securities exchanges or markets" constituted "intangible investment security" within meaning of UCC § 8-102 notwithstanding such notes were never publicly traded. Baker v. Gotz, 387 F. Supp. 1381 (D. Del. 1975), aff'd, 523 F.2d 1050 (3d Cir. Del. 1975) (applying Delaware law).

Stock certificates issued in bearer form were "securities," as defined in UCC § 8-102, and negotiable instruments under UCC § 8-105; thus, where there was evidence showing agreement of joint ownership with survivorship between decedent and her brother, where brother always had possession of one certificate and other certificate was delivered by decedent to her brother prior to her death, and where there was no evidence that delivery was procured by fraud or duress, brother had lawful possession of and owned stock certificates. Eastman v. Mendrick, 218 Kan. 78, 542 P.2d 347 (1975).

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained $20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. Victory Nat'l Bank v. Oklahoma State Bank, 520 P.2d 675 (Okla. 1973).

A "call" is not a "security" within the definition of UCC § 8-102, thus, UCC § 8-319 is inapplicable to a call option. Cohn, Ivers & Co. v. Gross, 56 Misc. 2d 491 (1968).

11. Other terms.

There is no "issuance" in meaning of UCC § 8-102 unless it is determined that there is voluntary transfer of possession to holder or remitter. Bankhaus Hermann Lampe KG v. Mercantile-Safe Deposit & Trust Co., 466 F. Supp. 1133 (S.D.N.Y. 1979).

In action by bank against mortgage company for breach of contract to sell bank mortgage-backed securities guaranteed by Government National Mortgage Association (GNMA), where evidence showed (1) that such sale was orally arranged by mortgage broker, (2) that mortgage company did not authorize broker to make contract with bank, but contemplated solicitation of offer to buy at specified price, subject to acceptance of proposed written commitment, and (3) that mortgage company repudiated oral contract made by broker on October 1, 1973, long before date fixed for contract's performance, court held (1) that mortgage company was not liable to bank, since it did not authorize broker to make oral contract in suit and did not subsequently ratify it, (2) broker, because of breach of its implied warranty of authority, was liable to bank for all damages resulting from such breach, (3) letter sent by bank to confirm oral contract satisfied statute of frauds provision in UCC § 8-319, since it was written promptly, was received by party against whom enforcement was sought (mortgage company), and was not objected to in writing within ten days, (4) securities involved were investment securities within meaning of UCC § 8-102, (5) bank did not attempt to "cover" such securities by independent purchases on the market, (6) bank's damages were to be measured by damages that bank could have recovered from nonperforming seller for breach of an authorized contract, (7) under UCC § 2-713(1), such measure of damages was difference between market price of securities at time when bank, as purchaser thereof, learned of breach and contract price of securities, (8) phrase "at the time when the buyer learned of the breach" in UCC § 2-713(1) means, in present suit, "at the time the buyer learned of the repudiation," and (9) UCC § 2-713(1) would be interpreted to measure bank's damages as occurring "within a commercially reasonable time" after bank learned of repudiation of oral contract (applying New Jersey law; holding that because of circumstances in GNMA securities market at time of mortgage company's anticipatory repudiation of oral contract in suit, a commercially reasonable time for bank to await performance, as provided by UCC § 2-610(a), did not extend substantially beyond date on which repudiation occurred). First Nat'l Bank v. Jefferson Mtg. Co., 576 F.2d 479 (3d Cir. N.J. 1978).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law of Rhode Island, alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent, under UCC § 8-102 transfer of stock certificates by transfer agent was investment security transaction within contemplation of Article 8 of UCC. Reinhard v. Textron, Inc., 516 P.2d 1325 (Okla. 1973).

III. Under Former § 75-8-303.

12. "Broker."

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201(44), value was given for transfer of stock when father-in-law accepted stock as security for pre-existing claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301(2), he acquired stock free of bank's adverse claim. Prisbrey v. Noble, 505 F.2d 170 (10th Cir. Utah 1974).

IV. Under Former § 75-8-308.

13. Indorsement.

There is no liability imposed on an accommodation endorser to a guarantor. Thus, an accommodation endorser owes no duty to a guarantor in the event that the guarantor, who has the liability of a co-maker, pays the note's holder; however, this does not preclude an accommodation endorser and a guarantor from agreeing or contracting privately as to their liability. Comfort Engineering Co. v. Kinsey, 523 So. 2d 1019, 6 UCCRS 2d 1191 (Miss. 1986).

Under UCC § 8-301(1), title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued $ 5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313(1)(a) since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. Rare Earth, Inc. v. Hoorelbeke, 401 F. Supp. 26, 187 U.S.P.Q. 291, 17 UCCRS 503 (S.D.N.Y. 1975).

One acquiring shares of stock by delivery after indorsement in blank has the right, as the holder, to convert the blank indorsement into a special indorsement by designating himself as the transferee. Morrison v Liberty Discount & Sav. Bank, 61 Lack Jur 37 (Pa. 1959).

ATTORNEY GENERAL OPINIONS

UCC Investment Securities Law, Miss. Code Section 75-8-102, recognizes both physical instrument representing "security" and "book entry" representation of "security". Sheppard, Feb. 18, 1993, A.G. Op. #93-0018.

RESEARCH REFERENCES

ALR. What is a "security" under UCC Art 8. 11 A.L.R.4th 1036.

Partnership and joint venture interests as securities within meaning of federal Securities Act of 1933 (15 USCS § 77a et seq.) and Securities and Exchange Act of 1934 (15 USCS § 78a et seq). 58 A.L.R. Fed. 408.

Commodities futures contract or account as included in meaning of "security" as defined in § 3(a)(10) of the Securities Exchange Act of 1934 (15 USCS § 78c(a)(10)). 58 A.L.R. Fed. 616.

"Risk capital" test for determination of whether transaction involves security, within meaning of federal Securities Act of 1933 (15 USCS § 77a et seq.) and Securities Exchange Act of 1934 (15 USCS § 78a et seq.), 68 A.L.R. Fed. 89.

Am Jur. 4 Am. Jur. 2d, Alteration of Instrument § 24.

11 Am. Jur. 2d, Bills and Notes §§ 5, 11, 351.

12 Am. Jur. 2d, Bonds § 54.

12 Am. Jur. 2d, Brokers §§ 1-5, 113 et seq.

15A Am. Jur. 2d, Commercial Code §§ 68-70, 73, 74, 90, 91, 98-100.

18 Am. Jur. 2d, Corporations §§ 21, 394 et seq.

18A Am. Jur. 2d, Corporations §§ 504, 674 et seq.

50 Am. Jur. 2d, Letters of Credit §§ 2, 4, 8.

"Instrument" defined, 6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:93.

Instruction to jury; definition of security, 6 Am. Jur. Pl & Pr Forms, Investment Securities, Form 8:2.

Purchase; fraudulent actions by customer, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:31, 8:32, 8:33, 8:41, 8:42.

Definitions, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, § 253:2781 et seq.

CJS. 12 C.J.S. Brokers § 2, 18 C.J.S., Corporations § 285 et seq., 19 C.J.S., Corporations § 751 et seq.

§ 75-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this chapter, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this chapter and not by Chapter 3, even though it also meets the requirements of that chapter. However, a negotiable instrument governed by Chapter 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in Section 75-9-102(a)(15), is not a security or a financial asset.

(g) A document of title is not a financial asset unless Section 75-8-102(a)(9)(iii) applies.

SOURCES: Laws, 1996, ch. 468, § 4; Laws, 2001, ch. 495, § 17; Laws, 2006, ch. 527, § 58, eff from and after July 1, 2006.

Editor's Note — A former § 75-8-103 [Codes, 1942, § 41A:8-103; Laws, 1966, ch. 316, § 8-103; 1990, ch. 384, § 2, eff from and after July 1, 1990], which pertained to an issuer's lien, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-209.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 86, 87.

18A Am. Jur. 2d, Corporations § 864.

CJS. 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 453, 460.

9 C.J.S. Banks and Banking §§ 548, 550.

§ 75-8-104. Acquisition of security or financial asset or interest therein.

(a) A person acquires a security or an interest therein, under this chapter, if:

(1) The person is a purchaser to whom a security is delivered pursuant to Section 75-8-301; or

(2) The person acquires a security entitlement to the security pursuant to Section 75-8-501.

(b) A person acquires a financial asset, other than a security, or an interest therein, under this chapter, if the person acquires a security entitlement to the financial asset.

(c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in Part 5 of this chapter, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in Section 75-8-503.

(d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b).

SOURCES: Laws, 1996, ch. 468, § 5, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-104 [Codes, 1942, § 41A:8-104; Laws, 1966, ch. 316, § 8-104; 1990, ch. 384, § 3, eff from and after July 1, 1990], pertaining to overissue, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-210.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 68, 69, 70, 77, 82, 97, 114, 116.

18A Am. Jur. 2d, Corporations §§ 850, 914-916.

CJS. 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation § 442.

§ 75-8-105. Notice of adverse claim.

(a) A person has notice of an adverse claim if:

(1) The person knows of the adverse claim;

(2) The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) One (1) year after a date set for presentment or surrender for redemption or exchange; or

(2) Six (6) months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) Whether in bearer or registered form, has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(2) Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under Chapter 9 is not notice of an adverse claim to a financial asset.

SOURCES: Laws, 1996, ch. 468, § 6, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-105 [Codes, 1942, § 41A:8-105; Laws, 1966, ch. 316, § 8-105; 1990, ch 384, § 4, eff from and after July 1, 1990], pertained to the negotiability of securities and certain presumptions in actions on securities, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-114.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Collecting banks, see § 75-4-201 et seq.

Effect of overissue, see § 75-8-104.

"Bona fide purchaser," see § 75-8-302.

Staleness as notice of adverse claims, see § 75-8-305.

Registration of security transfers, see § 75-8-401 et seq.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-8-304.
6. In general.
III. Under Former § 75-8-305.
7. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-304.

6. In general.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

Purchasers of corporate stock acquire only rights of converters they purchased from under UCC § 8-304 where purchasers had notice of adverse claim upon reading newspaper article after which they arranged and attended press conference with converters. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

While UCC § 8-304 specifies three situations in which one will be deemed to have constructive notice as a matter of law, the list is not exhaustive. On the contrary, as noted in Official Comment 1, the trier of fact may determine that the suspicious characteristics of the transaction constitute the reason to know that is necessary to establish notice. This is particularly true in the case of a commercially sophisticated purchaser, such as a bank. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Under UCC §§ 8-304 and 1-201(25), either actual or constructive notice will prevent one from obtaining the status of a bona fide purchaser. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Bank knew of some "adverse claim" as matter of law, under UCC § 8-304, as to securities which bank said it believed belonged to corporation, but which it cashed for individual benefit of corporation's officers, to pay bank's and its officer's claims against them and commissions to them. Fidelity Std. Life Ins. Co. v. First City Fin. Corp., 325 So. 2d 879 (La. App. 1976), application denied, 329 So. 2d 465 (La. 1976).

Stockbroker who purchased stolen treasury notes from bank which sold notes on behalf of bank's customer, was purchaser in good faith under UCC §§ 8-301 and 8-304 and, thus, was not liable for conversion of notes, notwithstanding transmittal slips from bank to broker stated that transactions were for account of named person, where broker bought notes without knowledge of any suspicious circumstances from bank with whom it had been dealing over the years. United States Fid. & Guar. Co. v. Royal Nat'l Bank, 545 F.2d 1330 (2d Cir. N.Y. 1976).

Bank which received stock of 83-year-old woman as collateral for loan to corporation, took with notice of adverse claim within meaning of UCC § 8-304, although bank received stock from individual under written authority from woman to pledge stock, where bank had knowledge that individual stood in fiduciary relationship to owner of stock as her investment counselor for many years, and where bank was aware that loan proceeds were for benefit of corporation controlled by such person. Seattle-First Nat'l Bank v. Randall, 532 F.2d 1291 (9th Cir. Or. 1976).

Failure of bank to investigate borrower or his right to negotiate stolen bearer bonds that bank accepted as collateral for loan did not constitute bad faith precluding bank from enjoying status of bona fide purchaser. Gutekunst v. Continental Ins. Co., 486 F.2d 194 (2d Cir. N.Y. 1973).

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301 since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. Phoenix Ins. Co. v. National Bank & Trust Co., 14 UCCRS 162, 366 F. Supp. 340 (M.D. Pa. 1972), (applying Pennsylvania law), affd without op, 485 F.2d 681 (3d Cir. Pa. 1973).

A selling broker is recognized as a "purchaser" under this section. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

III. Under Former § 75-8-305.

7. In general.

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301(1) since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. Phoenix Ins. Co. v. National Bank & Trust Co., 14 UCCRS 162, 366 F. Supp. 340 (M.D. Pa. 1972), (applying Pennsylvania law), affd without op, 485 F.2d 681 (3d Cir. Pa. 1973).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bonds § 29.

18A Am. Jur. 2d, Corporations §§ 535-537, 539-544, 702 et seq.

"Notice" and "knowledge" of a fact defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

CJS. 18B C.J.S., Corporations §§ 143, 670 et seq.

§ 75-8-106. Control.

(a) A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) The certificate is endorsed to the purchaser or in blank by an effective endorsement; or

(2) The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has "control" of an uncertificated security if:

(1) The uncertificated security is delivered to the purchaser; or

(2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has "control" of a security entitlement if:

(1) The purchaser becomes the entitlement holder;

(2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c) or (d) has control, even if the registered owner in the case of subsection (c) or the entitlement holder in the case of subsection (d) retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subsection (c)(2) or (d)(2) without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 7; Laws, 2001, ch. 495, § 18, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-106 [Codes, 1942, § 41A:8-106; Laws, 1966, ch. 316, § 8-106; 1990, ch 384, § 5, eff from and after July 1, 1990], which provided that the laws of the issuer's jurisdiction governed the validity of a security and the rights and obligations of the issuer with respect to registration of transfer, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. For present similar provisions, see §§ 75-8-110, 75-9-104 through 75-9-107 and 75-9-314.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 74.

18 Am. Jur. 2d, Corporations §§ 12, 14, 24, 26.

CJS. 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation § 442.

§ 75-8-107. Whether indorsement, instruction, or entitlement order is effective.

(a) "Appropriate person" means:

(1) With respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) With respect to an instruction, the registered owner of an uncertificated security;

(3) With respect to an entitlement order, the entitlement holder;

(4) If the person designated in paragraph (1), (2), or (3) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

(5) If the person designated in paragraph (1), (2), or (3) lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) It is made by the appropriate person;

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person,

including, in the case of an instruction or entitlement order, a person who has control under Section 75-8-106(c)(2) or (d)(2); or

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) The representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

SOURCES: Laws, 1996, ch. 468, § 8, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-107 [Codes, 1942, § 41A:8-107; Laws, 1966, ch. 316, § 8-107; 1990, ch. 384, § 6, eff from and after July 1, 1990], pertaining to the deliverability of securities and action for failure of buyer to deliver price, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The provisions of former § 75-8-107 were omitted from Revised Article 8.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 103-105, 107, 114.

§ 75-8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

(1) The certificate is genuine and has not been materially altered;

(2) The transferor or indorser does not know of any fact that might impair the validity of the security;

(3) There is no adverse claim to the security;

(4) The transfer does not violate any restriction on transfer;

(5) If the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(6) The transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

(1) The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;

(2) The security is valid;

(3) There is no adverse claim to the security; and

(4) At the time the instruction is presented to the issuer:

(i) The purchaser will be entitled to the registration of transfer;

(ii) The transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;

(iii) The transfer will not violate any restriction on transfer; and

(iv) The requested transfer will otherwise be effective and rightful.

(c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:

(1) The uncertificated security is valid;

(2) There is no adverse claim to the security;

(3) The transfer does not violate any restriction on transfer; and

(4) The transfer is otherwise effective and rightful.

(d) A person who indorses a security certificate warrants to the issuer that:

(1) There is no adverse claim to the security; and

(2) The indorsement is effective.

(e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:

(1) The instruction is effective; and

(2) At the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.

(f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.

(g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has authority to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g).

(i) Except as otherwise provided in subsection (g), a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f). A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b), and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of the customer.

SOURCES: Laws, 1996, ch. 468, § 9, eff from and after July 1, 1996.

Editor's Note — A former § 75-89-108 [Laws, 1990, ch 384, § 7, eff from and after July 1, 1990], pertained to registered pledges, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The provisions of former § 75-8-108 were omitted from Revised Article 8.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Varying effect of provisions of this code by agreement, see § 75-1-302.

Requisite indication of issuer's lien on security, see § 75-8-209.

Rights and title acquired by purchaser of security, see § 75-8-302.

Lost, destroyed, and stolen securities, see § 75-8-405.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-306.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-306.

6. In general.

Where (1) joint owner of bank certificates and shares of stock was deprived of his interest therein by other joint owner's forgery of first joint owner's signatures to documents transferring such securities to second joint owner, and (2) stockbroker for both joint owners guaranteed genuineness of first joint owner's signatures on transfer documents, stockbroker could not, by relying on UCC § 8-306 and § 8-315, recover damages from second joint owner for forgery of first joint owner's signatures on theory that such forgery caused broker to be liable to first joint owner. In such situation, UCC § 8-306, which relate to warranties and wrongful transfer, were inapplicable since stockbroker, although possessing rights and privileges of purchaser under UCC § 8-306, was not purchaser for value to whom warranties of UCC § 8-306 run. Roth v. Roth, 571 S.W.2d 659, 5 A.L.R.4th 350 (Mo. Ct. App. 1978).

Bank which was bona fide purchaser of 16 stolen treasury bills did not, on transmitting such bills for value to plaintiff correspondent bank, breach any warranty created by UCC § 8-306, since (1) fact that transmitting bank was bona fide purchaser at time it purchased each stolen bill satisfied warranty to plaintiff of effective and rightful transfer; (2) evidence did not show any breach of warranty that bills were genuine and not altered; and (3) bank at time of transmitting bills to plaintiff had no knowledge of any facts that might impair their validity. Morgan Guar. Trust Co. v. New England Merchants Nat'l Bank, 438 F. Supp. 97 (D. Mass. 1977).

Ultimate transferee of restricted stock did not have standing to assert UCC § 8-306 breach of warranty claim against original transferor on basis of original transferor's omission of legend from stock certificates regarding restricted nature of stock, where ultimate transferee did not obtain stock as original transferor's immediate transferee. Ford v. Cannon, 413 F. Supp. 1393 (M.D. Fla. 1976).

In action arising out of payment for counterfeit United States treasury bill, intermediaries who were known by bank to be entrusted with delivery of bill on behalf of principal were not liable for breach of warranty of genuineness, since, under UCC § 8-306, they only warranted their own good faith and authority in transaction. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Record did not support conclusion that bank which directed broker to sell stock pledged to it as collateral was mere intermediary and as such warranted only its good faith and authority. First Nat'l Bank v. H. Hentz & Co., 498 S.W.2d 478 (Tex. Civ. App. 1973).

One who presents a security to the issuer for discharge warrants only that he is entitled to payment. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

RESEARCH REFERENCES

ALR. Effectiveness, as pledge, of transfer of corporate stock. 53 A.L.R.2d 1396.

Am Jur. 12 Am. Jur. 2d, Brokers §§ 115-135, 137-196.

15A Am. Jur. 2d, Commercial Code §§ 99-100.

18A Am. Jur. 2d, Corporations §§ 240, 245, 407, 463-465.

CJS. 18 C.J.S., Corporations § 191.

19 C.J.S., Corporations § 755.

§ 75-8-109. Warranties in indirect holding.

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) There is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in Section 75-8-108(a) or (b).

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in Section 75-8-108(a) or (b).

SOURCES: Laws, 1996, ch. 468, § 10, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-110. Applicability; choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

(1) The validity of a security;

(2) The rights and duties of the issuer with respect to registration of transfer;

(3) The effectiveness of registration of transfer by the issuer;

(4) Whether the issuer owes any duties to an adverse claimant to a security; and

(5) Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e), governs:

(1) Acquisition of a security entitlement from the securities intermediary;

(2) The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;

(3) Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and

(4) Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5).

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a

particular jurisdiction is the securities intermediary's jurisdiction for the purposes of this part, this article or the Uniform Commercial Code, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the securities intermediary and its entitlement holder expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding paragraphs of this subsection apply, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding paragraphs of this subsection apply, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

SOURCES: Laws, 1996, ch. 468, § 11; Laws, 2001, ch. 495, § 19, eff from and after Jan. 1, 2002.

Editor's Note — Section 75-8-110 is derived from former § 75-8-106. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Perfection of security interests in multiple state transactions, see § 75-9-301 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-106.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-106.

6. In general.

Under UCC § 8-106, New York court would apply New Jersey law with respect to questions concerning validity as securities of engravings in action arising out of theft of shipment of series of equipment trust certificate engravings from Kennedy International Airport and subsequent use of engravings as collateral for loan obtained from plaintiff since defendant was organized under law of New Jersey. Bankhaus Hermann Lampe KG v. Mercantile-Safe Deposit & Trust Co., 466 F. Supp. 1133 (S.D.N.Y. 1979).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law in Rhode Island, plaintiff alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent: (1) under UCC § 8-106 rights and duties of issuer with respect to such transfer were governed by law, including conflicts of laws rules, of jurisdiction of organization of issue, i.e., Rhode Island; (2) since Rhode Island conflicts of laws rules made Oklahoma statute of limitations applicable and since plaintiff's action to enforce liability of corporation for improper registration of her stock under UCC § 8-311 was not limited by any specific provision of Oklahoma statute of limitations, it was limited by general provision, providing five year limitation period for action not otherwise provided for in statute. Reinhard v. Textron, Inc., 516 P.2d 1325 (Okla. 1973).

The proper construction of § 8-406 dictates that the obligations of a transfer agent are the same as that of the issuer, and the net effect of § 8-106 and § 8-406 is to establish that the issuer and any of its transfer agents have equal obligations to security holders, regardless of which state's law is applicable to the case. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

In Welland Invest. Corp. v. First Nat Bank (1963) 81 NJ Super 180, 195 A2d 210, 1 UCCRS 324, an action by an investment company to compel a transfer of certain stock and for damages against the issuer and transfer agent for wrongful refusal to transfer, both the investment company and the transfer agent conceded that the law of Delaware appealed to the rights and duties of the issuer, a Delaware corporation, with respect to the registration and transfer of the stock in question. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

RESEARCH REFERENCES

ALR. Statutory requirements respecting issuance of corporate stock as applicable to foreign corporations. 8 A.L.R.2d 1185.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 11, 73, 74, 76.

16 Am. Jur. 2d, Conflict of Laws §§ 2, 81.

18 Am. Jur. 2d, Corporations §§ 243, 377, 378, 408

Application and construction of code, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:1.

CJS. 18 C.J.S., Corporations §§ 196, 399.

79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation § 461.

§ 75-8-111. Clearing corporation rules.

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this chapter and affects another party who does not consent to the rule.

SOURCES: Laws, 1996, ch. 468, § 12, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-112. Creditor's legal process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

SOURCES: Laws, 1996, ch. 468, § 13, eff from and after July 1, 1996.

Editor's Note — Section 75-8-112 is derived from former § 75-8-317. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Injunctions, see § 11-13-1 et seq.

Attachment in chancery, see § 11-31-1 et seq.

Attachment at law, see § 11-33-1 et seq.

Executions generally, see § 13-3-1 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-317.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-317.

6. In general.

In action by Philippine citizens for fraud in connection with stock investment in realty development in Spain, in which action one codefendant counterclaimed for $6,500,000 allegedly due on promissory notes issued by plaintiffs to pay for stock investment in suit, court held (1) that plaintiff held extensive assets in various securities outside United States; and (2) that counterclaiming defendant could not successfully base request for preliminary mandatory injunction against plaintiffs, which would direct them to transfer securities owned by them outside jurisdiction of New York state to New York state for attachment by sheriff, on UCC § 8-317 because (a) UCC § 8-317 does not change or eliminate well-established requirements for injunctive relief under New York law, and (b) New York requirements for injunctive relief include likelihood of ultimate success, irreparable injury, no adequate remedy at law, and balancing of equities, which requirements preclude issuance of injunction at creditor's mere request to compel assets outside jurisdiction of New York court to be brought within court's jurisdiction for attachment. Siy v. McMicking, 134 Misc. 2d 164 (1986).

Under UCC § 8-317, providing that if a security registered to judgment debtor cannot readily be levied on by ordinary legal process, judgment creditor who seeks to reach such security may obtain assistance of court "by injunction or otherwise," judgment creditor could enjoin transfer by issuer corporation of judgment debtor's stock in such corporation in order to protect judgment creditor's ability to execute on judgment until sheriff could take physical possession of stock. Dalton v. Meister, 84 Wis. 2d 303, 267 N.W.2d 326 (1978).

In creditor's action for breach of indemnity agreement, prejudgment remedy of attachment of certain securities owned by debtor was authorized by UCC § 8-317(2), even though subsection (1) of UCC § 8-317 requires that there be actual physical possession and control of stock certificates by sheriff before attachment can be perfected. Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152 (2d Cir. Conn. 1977), cert. denied, 434 U.S. 1046, 98 S. Ct. 892, 54 L. Ed. 2d 798 (1978).

It was unnecessary for there to be actual seizure of stocks in corporations formed pursuant to Alaska Native Claims Settlement Act before they could be attached, as provided in UCC § 8-317, since stocks, by virtue of federal law, were totally inalienable and, thus, policy considerations underlying UCC § 8-317 were not applicable because there was no innocent purchaser to protect. Calista Corp. v. DeYoung, 562 P.2d 338 (Alaska 1977).

In action by judgment creditor to invoke UCC § 8-317 to enable creditor to subject to levy and sale by sheriff shares of stock owned by defendants in defendant corporation, judgment for plaintiff which ordered delivery of such stock to sheriff for sale was proper because (1) legislature by adopting UCC § 8-317 clearly intended to provide judgment creditor with method of reaching securities for purpose of subjecting them to levy, and (2) term "security" used in UCC § 8-317 includes common stock in a corporation, such as stock owned by defendants. Grossman v. Glass, 239 Ga. 319, 236 S.E.2d 657 (1977).

In proper case creditor of security owner may seek equitable aid of court of competent jurisdiction to gain control of security which cannot be readily attached by means of ordinary procedures provided for in law. Fleming v. Gray Mfg. Co., 352 F. Supp. 724 (D. Conn. 1973).

Code § 8-317 providing that no levy upon outstanding security shall be valid until it is actually seized by officer was not enacted for purpose of determining what levy would suffice to entitle sheriff to poundage or to enforce money judgment against judgment debtor, but was intended to define rights of third parties claiming interest in attached personal property. Knapp v. McFarland, 462 F.2d 935, 18 A.L.R. Fed. 555 (2d Cir. N.Y. 1972).

The intent of the statute, providing that no levy upon an outstanding security is valid until it is actually seized by the officer, was not to determine what levy would suffice to entitle a sheriff to poundage or to enforce a money judgment against a judgment debtor but was rather enacted to protect bona fide purchasers for value of property subject to a judgment creditor's lien by invalidating a levy as to such parties unless the sheriff has taken actual possession. Knapp v. McFarland, 462 F.2d 935, 18 A.L.R. Fed. 555 (2d Cir. N.Y. 1972).

A levy by attachment against shares of stock is proper where directed against a bank holding the shares as custodian for the trustee of a voting trust to which the shares had been transferred, even though the voting trust agreement had been terminated by the time of the attachment. Proteus Food & Indus., Inc. v. Nippon Reizo Kabushiki Kaish, 4 U.C.C. Rep. Serv. 961 (1968, NY Sup).

The provisions of this section relating to attachment of securities are also applicable to evidences of indebtedness and certificates or instruments representing or securing an interest in the capital assets or property of any company, and certificates of indebtedness and evidences of ownership insofar as they represent interests in capital assets must, to be effectively attached, be actually seized, and although an attempted attachment execution on corporate stock was invalid because it was not actually seized, the attachment execution is not to be dissolved where it does not appear of record that the only property of the debtor in the hands of the garnishee comprises shares of stock. DeShong v. Cody, 36 Pa. D. & C.2d 109 (1964).

A federal district court in Pennsylvania had no jurisdiction under this section to compel a holding company sued on two promissory notes to bring to the district and deliver to the United States Marshal the capital stock of its four subsidiaries, in order that they might be made subject to foreign attachment, where none of the stock certificates was then or ever had been in Pennsylvania. Nederlandsche Handel-Maatschappij, N.V. v. Sentry Corp., 163 F. Supp. 800 (E.D. Pa. 1958).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 34, 36, 37, 538.

15A Am. Jur. 2d, Commercial Code § 91.

18A Am. Jur. 2d, Corporations §§ 479, 486-496.

30 Am. Jur. 2d, Executions §§ 150, 201, 202.

Judicial proceedings involving securities; to obtain possession, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:91, 8:92.

CJS. 18 C.J.S., Corporations §§ 339-341.

§ 75-8-113. Statute of frauds inapplicable.

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making.

SOURCES: Laws, 1996, ch. 468, § 14, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Statute of frauds, regarding lease contracts, see § 75-2A-201.

§ 75-8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

SOURCES: Laws, 1996, ch. 468, § 15, eff from and after July 1, 1996.

Editor's Note — Section 75-8-114 is derived from former § 75-8-105. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Inapplicability of provisions of code respecting commercial paper to investment securities, see § 75-3-103.

Burden of establishing signatures, defenses and due course, see § 75-3-308.

Issuer's responsibility and defenses, see § 75-8-202.

Rights and title acquired by purchaser of security, see § 75-8-301.

Effect of delivery without, and right to compel, endorsement, see § 75-8-307.

Negotiability of bonds issued by the Municipal Gas Authority of Mississippi, see § 77-6-31.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-8-105.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under former § 75-8-105.

6. In general.

The Uniform Commercial Code, under UCC § 8-105(1), treats investment securities as negotiable instruments. The code also, in UCC § 1-201(20), defines a "holder" as one who is "in possession" of an investment security that is drawn, issued, or indorsed to him or to his order, or to bearer or in blank. Under the code's definition of a holder, therefore, possession is a significant factor, and the possessor of an instrument is a "holder" without regard to the legality or propriety of his possession. Stewart Becker, Ltd. v. Horowitz, 94 Misc. 2d 766 (1978).

Under UCC § 8-105(2)(c), holders of debentures indorsed in blank, as to which signatures were admitted, were entitled on production of debentures to recover from bank that had issued them and defaulted in payment of interest thereon in absence of any defense to recovery by bank. In such case, bank's right of setoff, based on separate and distinct obligations of persons to whom debentures were originally issued and who had negotiated debentures to plaintiff holders, did not constitute "defense" within meaning of UCC § 8-105(2)(c). E.H. Hinds, Inc. v. Coolidge Bank & Trust Co., 6 Mass. App. Ct. 5, 372 N.E.2d 259 (1978).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. Brannon v. First Nat'l Bank, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action seeking replacement from corporations of securities as to which defendants had allegedly improperly registered transfers on forged indorsements: (1) trial court erred in applying provisions of UCC § 8-105(2)(b), that signatures on securities were "presumed to be genuine or authorized", where evidence was overwhelming that signatures were forged in furtherance of scheme by third parties, who had stolen certificates, to negotiate stock to others; (2) trial court also erred in finding that plaintiff were "otherwises precluded" under UCC § 8-311, from asserting an effectiveness of transfers where, other than separate finding that plaintiffs were precluded from recovery by unreasonable delay in notifying issuers, record contained no evidence of conduct by the plaintiffs that would preclude recovery; (3) trial court's findings were inadequate on issue whether plaintiffs had notified issuers as to missing securities "within a reasonable time", as required by UCC § 8-405, after they had noticed certificates were missing, where, though evidence amply supported court's finding as to date plaintiffs had notice of loss, it did not support further findings that letter sent to defendants some 41 days later was insufficient to notify them of loss, and that more than another month elapsed before adequate notice was given, and where court made no finding as to whether 41-day delay was unreasonable. Ibanez v. Farmers Underwriters Ass'n, 14 Cal. 3d 390, 534 P.2d 1336 (1975).

Stock certificates issued in bearer form were "securities," as defined in UCC § 8-102, and negotiable instruments under UCC § 8-105; thus, where there was evidence showing agreement of joint ownership with survivorship between decedent and her brother, where brother always had possession of one certificate and other certificate was delivered by decedent to her brother prior to her death, and where there was no evidence that delivery was procured by fraud or duress, brother had lawful possession of and owned stock certificates. Eastman v. Mendrick, 218 Kan. 78, 542 P.2d 347 (1975).

Under UCC § 8-105, as amended, in a silent record case, the holder of a security must affirmatively demonstrate that he is a bona fide purchaser within the UCC § 8-302 definition. Young v. Kaye, 443 Pa. 335, 279 A.2d 759, 1971.

Where the issuer has not questioned the signatures of the assignor on stock certificates or raised any question as to their validity, the holder of the securities has a prima facie right of action thereon. Perugino v. Samson Land & Dev. Co., 39 Pa. D. & C.2d 500 (1965).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bonds §§ 11, 42, 54.

15A Am. Jur. 2d, Commercial Code §§ 72, 73.

18 Am. Jur. 2d, Corporations § 18.

Instructions to jury; effect of unauthorized signature on issue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations § 190.

19 C.J.S., Corporations § 751 et seq.

§ 75-8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) Took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) In the case of a security certificate that has been stolen, acted with notice of the adverse claim.

SOURCES: Laws, 1996, ch. 468, § 16, eff from and after July 1, 1996.

Editor's Note — Section 75-8-115 is derived from former § 75-8-318. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Course of dealing and usage of trade, see § 75-1-303.
Contractual obligation of good faith, see § 75-1-304.
Similar provision respecting documents of title, see § 75-7-404.
Secured party's right to dispose of collateral after default, see § 75-9-601.
Embezzlement by conversion, see §§ 97-23-19 to 97-23-21.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-318.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-318.

6. In general.

While providing a remedy for the owners of misappropriated securities in UCC § 8-315, the Uniform Commercial Code does not foreclose recourse to an action at law for conversion (see Official Comment 2 to UCC § 8-315). However, the code has codified, in UCC §§ 8-301 and 8-302, the common-law protection extended to bona fide purchasers and has also extended, in UCC § 8-318, protection to agents who formerly went unprotected in many jurisdictions, even though they acted in good faith. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Where the agent is in the business of buying, selling, or otherwise dealing with securities, "good faith" is expressly defined by UCC § 8-318 as including the "observance of reasonable commercial standards." Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Although UCC § 8-318 purports to protect broker who transfers securities at insistence of principal who has no right to dispose of them, protection of UCC § 8-

318 is only available as defense, and broker has burden of presenting evidence to show that it acted in good faith and in accordance with reasonable commercial standards in making such transfer. North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

Where stock in custodial account established for minor's benefit was, after minor attained his majority, wrongfully indorsed by minor's father as alleged custodian and reissued by issuing companies on father's request, and where father as alleged custodian then opened account with defendant broker and used account for trading purposes with disastrous results to value of principal, in beneficiary's action against broker for value of stock, broker's contention that under UCC § 8-318 it was not liable for selling or otherwise dealing in such stock in good faith precluded summary judgment in favor of beneficiary, since issue as to broker's observance of reasonable commercial standards in dealing in such stock could not, on record involved in case, be decided on motion for summary judgment. Harris, Upham & Co. v. Harris, 142 Ga. App. 696, 236 S.E.2d 773 (1977).

In conversion action against bank which sold stolen treasury notes on behalf of its customer, bank acted in good faith and observed reasonable commercial standards pursuant to UCC § 8-318 in selling notes where, inter alia, bank had prior dealings with customer, nothing was suspect about customer's credentials, withdrawal by customer of large amount of cash from checking account which paid no interest was reasonable, transactions were in progress for more than one month without bank receiving any report that notes were missing or stolen, inquiries by bank addressed to appropriate federal agencies did not reveal that any of the notes were stolen or missing, customer did not disappear when funds were placed in suspense account, customer made personal daily visits to bank, and customer retained counsel to press his claim. United States Fid. & Guar. Co. v. Royal Nat'l Bank, 545 F.2d 1330 (2d Cir. N.Y. 1976).

In action against stockbroker for having sold stock held as community property on instructions of plaintiff's former husband and delivered proceeds to him in treasury bills, treasury bills met all requirements of securities under UCC §§ 8-102(1)(a) and 8-318, negating liability of broker for conversion in sale of securities according to instructions of principal; immunization from liability extended to delivery of proceeds to principal authorizing sale so long as good faith existed on part of broker. Martinez v. Dempsey-Tegeler & Co., 37 Cal. App. 3d 509 (2d Dist. 1974).

Section referred to as example of explicit requirement that party exercise more than "honesty in fact." Industrial Nat'l Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

It would seem that a rule of the New York Stock Exchange requiring the broker to use due diligence to learn the essential facts relative to its customers formulates what are "reasonable commercial standards." Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

The Uniform Commercial Code, which apparently modifies the law in this state somewhat in favor of the selling broker, provides that the test of good faith of selling broker includes "observance of regional commercial standards if he be in the business of buying, selling, or otherwise dealing with securities". Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

RESEARCH REFERENCES

Am Jur. 3 Am. Jur. 2d, Agency § 290.

12 Am. Jur. 2d, Brokers §§ 187, 196, 197, 199.

18 Am. Jur. 2d, Conversion §§ 33, 50.

Delivery to purchaser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:81.

CJS. 18 C.J.S., Corporations § 330.

§ 75-8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 17, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

PART 2.

ISSUE AND ISSUER.

SEC.

75-8-201. Issuer.
75-8-202. Issuer's responsibility and defenses; notice of defect or defense.
75-8-203. Staleness as notice of defect or defense.
75-8-204. Effect of issuer's restriction on transfer.
75-8-205. Effect of unauthorized signature on security certificate.
75-8-206. Completion or alteration of security certificate.
75-8-207. Rights and duties of issuer with respect to registered owners.
75-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.
75-8-209. Issuer's lien.
75-8-210. Overissue.

§ 75-8-201. Issuer.

(a) With respect to an obligation on or a defense to a security, an "issuer" includes a person that:

(1) Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) Becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

SOURCES: Laws, 1996, ch. 468 § 18, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-201 [Codes, 1942, § 41A:8-201; Laws, 1966, ch. 316, § 8-201; 1990, ch. 384, § 8, eff from and after July 1, 1990], pertaining to issue and issuer, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-201.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Responsibility and defenses of issuer, see § 75-8-202.

Registration of security transfers, see § 75-8-401 et seq.

Mississippi Securities Act, generally, see § 75-71-101 et seq.

Small business investment companies, see §§ 79-7-1 to 79-7-7.

Investment trusts, see § 79-15-1 et seq.

Fiduciary security transfers, see § 91-11-1 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-201.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-201.

6. In general.

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple purchaser. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

RESEARCH REFERENCES

ALR. Statutory requirements respecting issuance of corporate stock as applicable to foreign corporations. 8 A.L.R.2d 1185.

Am Jur. 15A Am Jur 2d, Commercial Code §§ 75, 78, 79, 82-84.

18A Am Jur 2d, Corporations §§ 21, 239, 240, 674 et seq.

Instruction to jury; effect of unauthorized signature on issue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations § 285 et seq.

19 C.J.S., Corporations § 751 et seq.

§ 75-8-202. Issuer's responsibility and defenses; notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in Section 75-8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

SOURCES: Laws, 1996, ch. 486, § 19, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-202 [Codes, 1942, § 41A:8-202; Laws, 1966, ch. 316, § 8-202; 1990, ch. 384, § 9, eff from and after July 1, 1990], pertaining to issuer's responsibility and defenses and notice of defect or defense, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-202.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Time of notice of adverse claims, see § 75-8-105.

Time when notice of defect or defense chargeable to purchaser of security, see § 75-8-203.

Completion or alteration of security, see § 75-8-206.

Lien on security in favor of issuer, see § 75-8-209.

Overissue of securities, see § 75-8-210.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-8-202.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-202.

6. In general.

Payment under junior debentures need not be made where title to securities recited that it was "Convertible Subordinated Debenture" with further specific caveat of subordination to senior indebtedness, as set forth in indenture, and where senior debentures were in default. Kurtz v. American Export Indus., Inc., 49 A.D.2d 557 (1st Dep't 1975), aff'd, 39 N.Y.2d 738, 384 N.Y.S.2d 774, 349 N.E.2d 874 (1976), motion denied, 39 N.Y.2d 739, 384 N.Y.S.2d 774, 349 N.E.2d 875 (1976).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. Dean Witter & Co. v. Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974) (applying Pennsylvania law).

A restriction on the alienation of stock imposed by an amendment to the corporate charter adopted prior to the passage of the Delaware statute which limits the power of corporations to restrict the alienability of their stock was, nevertheless, ineffective against the plaintiff who had acquired previously issued shares at the time when no restrictions as to their sale were in force. With respect to the prestatutory amendment, upholding the restriction would contravene policy provisions that restraints are generally disfavored and are to be permitted only so long as they reasonably relate to a valid corporate purpose. The post-statute restriction was likewise unenforceable where the shareholder was not a party to the agreement of restriction and did not vote if favor of it. B & H Whse., Inc. v. Atlas Van Lines, 490 F.2d 818 (5th Cir. Tex. 1974).

In stockholder's derivative claim, neither evidence nor pleadings established which parties were present owners of outstanding stock which assertedly ought to be cancelled or redeemed, and therefore cancellation was not appropriate in light of UCC § 8-202 concerning rights of purchasers for value and without notice. Eastern Oklahoma Tel. Co. v. Ameco, Inc., 437 F.2d 138 (10th Cir. Okla. 1971).

RESEARCH REFERENCES

ALR. Rights, duties, and liability of corporation in connection with transfer of stock of infants or incompetent. 3 A.L.R.2d 881.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Patent rights, copyrights, trademarks, secret processes, and the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received. 37 A.L.R.2d 913.

Am Jur. 12 Am. Jur. 2d, Bonds § 54.

15A Am. Jur. 2d, Commercial Code §§ 77-79.

18A Am. Jur. 2d, Corporations §§ 484, 504, 507, 702 et seq.

Answer; defense; material change in character of security issued, 6 Am. Jur. Pl & Pr Forms (Rev) Investment Securities, Form 8:21.

Effect of bona fide purchase and reregistration of security, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

CJS. 18 C.J.S., Corporations §§ 285 et seq., 350.

19 C.J.S., Corporations § 751 et seq.

§ 75-8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one (1) year after that date; or

(2) Is not covered by paragraph (1) and the purchaser takes the security more than two (2) years after the date set for surrender or presentation or the date on which performance became due.

SOURCES: Laws, 1996, ch. 486, § 20, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-203 [Codes, 1942, § 41A:8-203; Laws, 1966, ch. 316, § 8-203; 1990, ch. 384, § 10, eff from and after July 1, 1990], pertaining to staleness as notice of defects or defenses, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-203.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Staleness of notice of adverse claims, see § 75-8-114.

Purchaser's notice of defects or defense, see § 75-8-202.

Overissue of security, see § 75-8-210.

RESEARCH REFERENCES

ALR. Validity, construction and effect of provisions of article of incorporation of stock certificates relating to call, redemption, or retirement of common stock. 48 A.L.R.2d 392.

Redemption or retirement of preferred stock. 46 A.L.R.3d 7.

Am Jur. 12 Am. Jur. 2d, Bonds § 28.

15A Am. Jur. 2d, Commercial Code § 81.

18A Am. Jur. 2d, Corporations §§ 504, 535 et seq.

"Notice and "knowledge" of a defect defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

CJS. 18 C.J.S., Corporations § 191.

19 C.J.S., Corporations § 779.

§ 75-8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) The security is certificated and the restriction is noted conspicuously on the security certificate; or

(2) The security is uncertificated and the registered owner has been notified of the restriction.

SOURCES: Laws, 1996, ch. 486, § 21, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-204 [Codes, 1942, § 41A:8-204; Laws, 1966, ch. 316, § 8-204; 1990, ch. 384, § 11, eff from and after July 1, 1990], pertaining to the effect of an issuer's restrictions on transfer, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-204.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — What constitutes "issuer," see § 75-8-201.

Requisite to validity of issuer's lien on security, see § 75-8-209.

Registration of securities transfers, see § 75-8-401 et seq.

Liability of issuer registering transfer of security on unauthorized endorsement, see § 75-8-404.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-204.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-204.

6. In general.

The phrase "transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed," which was printed on a stock certificate as part of the common format, did not render a transfer invalid. Burns v. Burns, 789 So. 2d 94 (Miss. Ct. App. 2000).

A restriction contained in a certificate of incorporation requiring that the shares of stock, before being sold to anyone, be first offered for sale proportionately to the other holders of shares of stock in the corporation, is a valid and reasonable restriction binding the stockholders (Uniform Commercial Code, § 8-204) and therefore takes precedence and controls over the provisions in testator's will directing the executor to offer 25% of his shares for sale to a nonstockholder. A provision according the corporation a right or first option to purchase the stock is valid and enforceable provided the restraint on alienation of stock effectuates a lawful purpose and is in accord with public policy. In re Estate of Hatfield, 93 Misc. 2d 472 (1978).

Failure to note on certificates restrictive provisions of corporation's articles of incorporation, was not bar to enforcement against person who had actual notice of them. Irwin v. West End Dev. Co., 481 F.2d 34 (10th Cir. Colo. 1973), cert. denied, 414 U.S. 1158, 94 S. Ct. 915, 39 L. Ed. 2d 110 (1974) (applying Colorado law).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. Dean Witter & Co. v. Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974) (applying Pennsylvania law).

In action to compel corporation to transfer upon its books stock certificate given by plaintiff's former husband to plaintiff's minor child, corporation and its officers were entitled to attempt to prove plaintiff's knowledge of stock transfer restriction and effect, if any, of her knowledge upon rights of child. McLeod v. Sandy Island Corp., 260 S.C. 209, 195 S.E.2d 178 (1973).

Although line of print on face of stock certificate referring to transfer restrictions printed on back of certificate did not stand out and could not be considered conspicuous, assignee of certificate was not entitled to summary judgment where record did not establish conclusively that assignee lacked knowledge of restriction as provided for in § 8-204. Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 53 A.L.R.3d 1265 (Tex. 1972).

A transferee is not bound by an unknown restriction which does not appear on the stock certificate. First Nat'l City Bank v. Donbar Dev. Corp., 4 U.C.C. Rep. Serv. 1070 (N.Y. App. Term 1968).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder, such a restriction is ineffective to support the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. Perugino v. Samson Land & Dev. Co., 39 Pa. D. & C.2d 500 (1965).

In a case where restrictions on transfer of stock in a corporation were contained in the articles of organization, but in which it did not appear that such restrictions were noted on any certificates or that the persons to whom certificates were issued ever saw any certificates except those issued to them, which did not contain the restrictions, it was said that it would appear that the instant section was applicable in the premises. Callahan v. Callahan, 345 Mass. 244, 186 N.E.2d 823 (1962).

RESEARCH REFERENCES

ALR. Provision for disposal of stock on death of shareholder as affecting validity of option or similar contract. 1 A.L.R.2d 1269.

Construction and application of provision restricting sale or transfer of corporate stock. 2 A.L.R.2d 745.

Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate. 29 A.L.R.2d 901.

Dominant shareholders' accountability to minority for profit, bonus, or the the like received on sale of stock to outsiders. 50 A.L.R.2d 1146.

Validity on restriction on alienation or transfer of corporate stock. 61 A.L.R.2d 1318.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 86.

18A Am. Jur. 2d, Corporations § 683 et seq.

"Notice" and "knowledge" of a fact defined, 6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30.

Restrictions on transfer of shares, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, § 253:2811 et seq.

CJS. 18 C.J.S., Corporations §§ 285-293.

19 C.J.S., Corporations §§ 664 et seq, 780.

§ 75-8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) An employee of the issuer, or of any of the persons listed in paragraph (1), entrusted with responsible handling of the security certificate.

SOURCES: Laws, 1996, ch. 486, § 22, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-205 [Codes, 1942, § 41A:8-205; Laws, 1966, ch. 316, § 8-205; 1990, ch. 384, § 12, eff from and after July 1, 1990], pertaining to the effect of unauthorized signatures on issue, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-205.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — This section being exception to lack of genuineness of security as defense, see § 75-8-202.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-205.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-205.

6. In general.

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained $20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. Victory Nat'l Bank v. Oklahoma State Bank, 520 P.2d 675 (Okla. 1973).

In a diversity action by a surety to recover funds paid out by it under a bond, it was held that the defendant employer corporation was not liable under UCC where an employee, entrusted with the responsibility of handling securities, caused unauthorized issuance of corporate stock and made several unauthorized entries on defendant's transfer books for his own independent purpose and not for the benefit of the defendant. Hartford Accident & Indem. Co. v. Lisky, 323 F. Supp. 103 (N.D. Ill. 1971).

Certificates in question, which have been admittedly issued without authority and are not manually signed, are nonetheless genuine. Stated differently, this means that the statutory requirement of a transfer agent's counter signature on stock certificates bearing facsimile signatures does not create an invalidity which precludes bona fide purchase. Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp., 293 F. Supp. 1383 (D. Colo. 1968).

Where church was careless in entrusting its treasurer's facsimile signature to fiscal agent and in failing to take precaution of requiring authentication of bonds by manual signature, church was liable to those who, in ordinary course of business, had purchased duplicate bonds printed fraudulently and without authority by fiscal agent. First Am. Nat'l Bank v. Christian Found. Life Ins. Co., 242 Ark. 678', 420 S.W.2d 912 (1967).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 77-79, 82, 83.

18A Am. Jur. 2d, Corporations §§ 681, 702 et seq.

Effect of overissue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:11 Pr Forms (Rev), Investment Securities, Form 8:22.

CJS. 18 C.J.S., Corporations § 191.

19 C.J.S., Corporations § 752.

§ 75-8-206. Completion or alteration of security certificate.

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) Any person may complete it by filling in the blanks as authorized; and

(2) Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

SOURCES: Laws, 1996, ch. 486, § 23, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-206 [Codes, 1942, § 41A:8-206; Laws, 1966, ch. 316, § 8-206; 1990, ch. 384, § 13, eff from and after July 1, 1990], pertaining to the completion or alteration of an instrument, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-206.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Unavailability of defenses of nondelivery and conditional delivery, see § 75-8-202.

Effect of unauthorized signature placed on security prior to, or in course of, issue, see § 75-8-205.

Overissue of securities, see § 75-8-210.

Rights acquired by purchaser, see § 75-8-302.

Delivery of security without endorsement, see § 75-8-304(d).

Manner of endorsing security, see § 75-8-304.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments § 24.

15A Am. Jur. 2d, Commercial Code §§ 83, 84.

18A Am. Jur. 2d, Corporations §§ 489, 507-510.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:51-8:57.

1 Am. Jur. Proof of Facts, Alteration of Instruments, Proof Nos. 1-3 (proof of alteration of instrument).

5 Am. Jur. Proof of Facts, Fraud, Proof No. 1 (proof of fraud).

CJS. 3B C.J.S., Alteration of Instruments § 7 et seq.

18 C.J.S., Corporations § 185, 188, 190.

19 C.J.S., Corporations § 750.

§ 75-8-207. Rights and duties of issuer with respect to registered owners.

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This chapter does not affect the liability of the registered owner of a security for a call, assessment, or the like.

SOURCES: Laws, 1996, ch. 486, § 24, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-207 [Codes, 1942, § 41A:8-207; Laws, 1966, ch. 316, § 8-207; 1990, ch. 384, § 14, eff from and after July 1, 1990], pertaining to the rights of an issuer with respect to a registered owner, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-207.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Registration of securities transfers, see § 75-8-401 et seq.

Rights, privileges, and duties of authenticating trustee, transfer agent, or registrar, see § 75-8-407.

Effect of notice to authenticating trustee, transfer agent, or registrar, see § 75-8-407.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-207.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-207.

6. In general.

Under UCC § 8-207, issuing corporation has right to treat registered owner of security as person exclusively entitled to vote, receive notifications, and otherwise exercise rights and powers of owner prior to due presentment of security in registered form for registration of transfer of ownership. Wanland v. C.E. Thompson Co., 64 Ill. App. 3d 46, 380 N.E.2d 1012 (1st Dist. 1978).

Since under UCC § 8-207, issuer of stock is permitted to treat registered owner as person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner until the stock or other certificate is duly presented for registration of transfer, the transfer of record ownership of stock not only is necessary to effectuate or render complete the transfer of title to the stock but actually passes the "legal title" to the stock, making a stock transfer tax payable. Monarch Life Ins. Co. v. State Tax Comm'n, 39 A.D.2d 31 (3d Dep't 1972), aff'd, 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684 (1973).

The fact that, at the time of death, stock is registered in the name of the decedent and was, concededly, possessed by him three days prior to his death gives rise to a presumption, rebuttable in nature, that the ownership of the stock was in the decedent. In re Donsavage Estate, 420 Pa. 587, 218 A.2d 112 (1966).

The corporation which issued stock certificates, until due presentment for registration of the transfer of such securities in registered form, may treat the person whose name is registered on the stock as entitled to exercise all the rights and powers of the owner insofar as the corporation is concerned. In re Donsavage Estate, 420 Pa. 587, 218 A.2d 112 (1966).

RESEARCH REFERENCES

ALR. Enforcement of stock subscriptions after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Action for dividends after refusal of corporation or its agents to register or effectuate transfer of stock. 22 A.L.R.2d 168.

Patent rights, copyrights, trademarks, secret processes, and the like, as "property" within provisions of law or charter forbidding issuance of corporate stock except for money paid or property received. 37 A.L.R.2d 913.

Transfer of stock of deceased owner to permit personal representative to vote. 7 A.L.R.3d 638.

Construction and effect of UCC § 8-207(1) allowing issuer of investment security to treat registered owner as entitled to owner's rights until presentment for registration of transfer. 21 A.L.R.4th 879.

Am Jur. 18B Am. Jur. 2d, Corporations §§ 1001-1006, 1211.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121-8:126.

CJS. 18 C.J.S., Corporations §§ 297, 350.

§ 75-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) The certificate is genuine;

(2) The person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and

(3) The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) does not assume responsibility for the validity of the security in other respects.

SOURCES: Laws, 1996, ch. 486, § 25, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-208 [Codes, 1942, § 41A:8-208; Laws, 1966, ch. 316, § 8-208; 1990, ch. 384, § 15, eff from and after July 1, 1990], pertaining to the effect of the signature of authenticating trustee, registrar or transfer agent, was repealed by Laws of 1996, ch. 468, § 71, effective June 30, 1996. The section above is derived from former § 75-8-208.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effect of unauthorized signature of authenticating trustee, registrar, or transfer agent, see § 75-8-205.

Duty of authenticating trustee, registrar, or transfer agent, see § 75-8-407.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-208.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-208.

6. In general.

This section is a restatement of the prevailing case law as to the effect of the signature of an authenticating trustee. Montague v. Farmers Nat'l Bank, 3 Pa. D. & C.2d 462 (1955), rev'd on other grounds, 180 Pa. Super. 610, 121 A.2d 597 (1956).

RESEARCH REFERENCES

Am Jur. 15 Am. Jur. 2d, Commercial Code §§ 68, 69, 70, 76, 77.

18A Am. Jur. 2d, Corporations §§ 240, 321, 323, 367, 407, 446, 451 et seq., 464, 467, 468.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:51-8:57.

CJS. 18 C.J.S., Corporations §§ 191, 324, 350, 441-444, 526, 527, 530, 531.

19 C.J.S., Corporations § 755 et seq.

§ 75-8-209. Issuer's lien.

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

SOURCES: Laws, 1996, ch. 486, § 26, eff from and after July 1, 1996.

Editor's Note — Section 75-8-209 is derived from former § 75-8-103. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effectiveness of issuer's restrictions on transfer, see § 75-8-204.

Liens, generally, see § 85-7-1 et seq.

RESEARCH REFERENCES

ALR. Construction and application of provisions of articles, bylaws, statutes, or agreements restricting alienation or transfer of corporate stock; payment of indebtedness to corporations. 2 A.L.R.2d 760.

Enforcement of stock subscription after suit on note of subscriber is barred by statute of limitations. 11 A.L.R.2d 1380.

Construction and effect of § 15 of Uniform Stock Transfer Act prohibiting restriction on transfer of shares unless such restriction is stated on the certificate. 29 A.L.R.2d 901.

Validity of restrictions on alienation of corporate stock. 61 A.L.R.2d 1318.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 75, 77, 82, 86, 87.

18A Am. Jur. 2d, Corporations §§ 180, 200 et seq., 447 et seq.

Lien of issuer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8-Investment Securities, § 253:2791 et seq.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2801 to 253:2803 (investment securities: reservation of lien).

§ 75-8-210. Overissue.

(a) In this section, "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.

(b) Except as otherwise provided in subsections (c) and (d), the provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

SOURCES: Laws, 1996, ch. 486, § 27, eff from and after July 1, 1996.

Editor's Note — Section 75-8-210 is derived from former § 75-8-104. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Defenses of issuer, see § 75-8-202.

Effect of unauthorized signature prior to, or in course of, issue of security, see § 75-8-205.

Completion or alteration of security, see § 75-8-206.

Warranty resulting from signature or authenticating trustee, registrar, or transfer agent, see § 75-8-208.

Registration of securities, see § 75-8-401 et seq.

RESEARCH REFERENCES

Am Jur. 18A Am. Jur. 2d, Commercial Code §§ 72, 75, 81, 82, 88, 118, 120, 291, 300, 301, 307-309, 464, 467, 468.

Effect of overissue, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:11.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2788 (investment securities: notice of overissue of securities and demand for similar securities or refund).

Effect of overissue, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2801, 253:2802.

CJS. 18 C.J.S., Corporations § 190.

19 C.J.S., Corporations § 751 et seq.

Part 3.

Transfer of Certificated and Uncertificated Securities.

Sec.
75-8-301. Delivery.
75-8-302. Rights of purchaser.
75-8-303. Protected purchaser.
75-8-304. Indorsement.
75-8-305. Instruction.
75-8-306. Effect of guaranteeing signature, indorsement, or instruction.
75-8-307. Purchaser's right to requisites for registration of transfer.
75-8-308 through 75-8-321. Repealed.

§ 75-8-301. Delivery.

(a) Delivery of a certificated security to a purchaser occurs when:

(1) The purchaser acquires possession of the security certificate;

(2) Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially endorsed to the purchaser by an effective endorsement and has not been endorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

SOURCES: Laws, 1996, ch. 468 § 28; Laws, 2001, ch. 495, § 20, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-301 [Codes, 1942, § 41A:8-301; Laws, 1966, ch. 316, § 8-301; 1990, ch. 384, § 16, eff from and after July 1, 1990], pertaining to rights acquired by purchasers and title acquired by a bona fide purchaser, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-302.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Notice to purchaser of adverse claims, see § 75-8-105.

Right to compel issuer to deliver identical security not constituting overissue, see § 75-8-210.

Rights and title acquired by purchaser on delivery, see § 75-8-302.

Necessity for delivery in order for endorsement of security to constitute transfer, see § 75-8-304.

Effect of unauthorized endorsement, see § 75-8-404.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-313.

6. In general; transfer and possession.
7. Delivery to third person.
8. Effect of delivery.
9. Effect of endorsement.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-313.

6. In general; transfer and possession.

Under statute defining "possession", the meaning of the term would be strained by a holding that possession of certain shares of stock passed where the shares allegedly possessed are not even in existence. Kaufman v. Diversified Indus., Inc., 460 F.2d 1331 (2d Cir. N.Y. 1972), (applying New York law) cert. denied, 409 U.S. 1038, 93 S. Ct. 517, 34 L. Ed. 2d 487 (1972), on remand, 356 F. Supp. 827 (S.D.N.Y. 1973).

Trial court erred in finding that there was no valid transfer of corporate stock from share holder to his sons where testimony at trial supported conclusion that valid transfer took place and where plaintiffs did not challenge fact that father gave sons stock certificates, but only claimed that his action did not constitute delivery; fact that father had access to vault where certificates were kept after transfer did preclude effective transfer between parties to transaction. Brener v. Industrial Steel Container Co., 303 Minn. 275, 228 N.W.2d 115 (1975).

7. Delivery to third person.

Where prospective purchaser of corporate stock executed promissory note for agreed price and his note together with share certificates were placed in possession of third party for safekeeping under agreement that certificates, already made out in prospective purchaser's name, would be delivered to him when note was paid, there was no evidence that prospective purchaser received any rights in stock which was alleged to have served as collateral, since there was no evidence of delivery to prospective purchaser or his agent and the fact that stock was issued in his name was insufficient to establish delivery. McCorquodale v. Holiday, Inc., 90 Nev. 67, 518 P.2d 1097 (1974).

8. Effect of delivery.

Creditor who loaned money to debtor to purchase stock in exchange for security interest in stock did not have perfected, secured interest in stock, where stock certificate was not issued to creditor until after bankruptcy filing. Williams v. Indi-Bel, Inc., 167 B.R. 77 (Bankr. N.D. Miss. 1994).

Where (1) municipal bond dealer, prior to filing against it of involuntary petition in bankruptcy, (a) sold certain bonds to customer, (b) sent customer's nominee confirmation tickets concerning such sale, and (c) sent properly completed confirmation and delivery tickets concerning sale to defendant municipal-bond clearing facility in order to effectuate delivery of bonds to dealer's customer, and where (2) defendant clearing facility physically allocated specific bond certificates corresponding to dealer's instructions and recorded explicitly identifying information on bonds' delivery forms (including certificate numbers and name of dealer's customer), activities of dealer and defendant clearing facility constituted sufficient identification, "by book entry or otherwise," of bonds sold to customer under UCC § 8-313, and dealer, by virtue of its contractual relationship with clearing facility, was not required by UCC § 8-313 to have actual physical possession of certificates. Matthysse v. Securities Processing Servs., Inc., 444 F. Supp. 1009 (S.D.N.Y. 1977).

Where defendant made telephone call from Arizona to prospective purchaser in Texas, offering to sell and soliciting subscriptions for certain securities, telephone negotiations between defendant and purchaser amounted to an "offer" to person within state of Texas and fact that sale was to be finalized in Arizona was immaterial; criminal liability attached when defendant commenced dealing in securities within state of Texas, regardless of where commercial technicality of "delivery" was effectuated under UCC. Shappley v. State, 520 S.W.2d 766 (Tenn. Crim. App. 1974).

Stockbroker's claim for damages for conversion of corporate bond was properly denied, and its contractual claims properly held to be satisfied by return of appreciated bond and accumulated dividends where original transfer and delivery to customer was voluntary and made in normal course of business; customer became owner of bond upon its delivery to him and, from that point forward, broker had its remedy in action for price. Hayden Stone, Inc. v. Brode, 508 F.2d 895 (7th Cir. Ill. 1974).

9. Effect of endorsement.

When aunt caused stock to be issued in joint names with nephew and niece, respectively, and when delivery of new certificates was made to aunt, requirements of UCC § 8-309, stating that endorsement does not constitute transfer until delivery of security, and § 8-313, stating that delivery to purchaser occurs when he or persons designated by him acquires possession, were met notwithstanding physical delivery of stock certificates was not made to nephew or niece. Robison v. Fickle, 167 Ind. App. 651, 340 N.E.2d 824 (1976).

Under UCC § 8-301, title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued $5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. Rare Earth, Inc. v. Hoorelbeke, 401 F. Supp. 26, 187 U.S.P.Q. 291, 17 UCCRS 503 (S.D.N.Y. 1975).

Where husband physically delivered stock certificate to wife with intention of making gift, transfer was complete even though certificate was not endorsed. Rogers v. Rogers, 271 Md. 603, 319 A.2d 119 (1974).

Where the original indorsement in blank of stock certificates was properly made, and the transferee holds the certificate in his possession, it is obvious that a delivery has taken place. Morrison v. Liberty Disct. & Sav. Bank, 61 Lack. Jur. 37 (Pa. 1960).

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Brokers § 196.

15A Am. Jur. 2d, Commercial Code § 107.

18A Am. Jur. 2d, Corporations §§ 283, 455, 466.

Purchase; fraudulent actions by customer, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:31-8:33.

Delivery to purchaser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:81.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121, 8:124, 8:126.

CJS. 18 C.J.S., Corporations § 294 et seq.

§ 75-8-302. Rights of purchaser.

(a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.

(b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

(c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

SOURCES: Laws, 1996, ch. 468 § 29; Laws, 2001, ch. 495, § 21, eff from and after Jan. 1, 2002.

Editor's Note — A former § 75-8-302 [Codes, 1942, § 41A:8-302; Laws, 1966, ch. 316, § 8-302; 1990, ch. 384, § 17, eff from and after July 1, 1990] was repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Issuer's rights, liability and defenses, see § 75-8-202 et seq.

Effect of issuer's restrictions on transfer, see § 75-8-204.

Bona fide purchaser, defined, see § 75-8-302.

Status and rights of party receiving security without necessary endorsement, see § 75-8-304.

Registration of transfer of securities, see § 75-8-401 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-301.

6. In general.
7. "Purchaser."
8. —"Bona fide purchaser."
9. —Not bona fide purchaser.
10. —"Holder in due course."
11. —Rights acquired by purchaser.
12. Liability for conversion.
13. "Transfer"; "delivery."
14. Practice and procedure; burden of proof.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-301.

6. In general.

The Uniform Commercial Code furnishes useful analogies in determining the liability of a stock broker for the conversion of shares through selling stolen shares on the order of a thief. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

7. "Purchaser."

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301 since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. Phoenix Ins. Co. v. National Bank & Trust Co., 14 UCCRS 162, 366 F. Supp. 340 (M.D. Pa. 1972), (applying Pennsylvania law), affd without op, 485 F.2d 681 (3d Cir. Pa. 1973).

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple purchaser. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

8. —"Bona fide purchaser."

While providing a remedy for the owners of misappropriated securities in UCC § 8-315, the Uniform Commercial Code does not foreclose recourse to an action at law for conversion (see Official Comment 2 to UCC § 8-315). However, the code has codified, in UCC §§ 8-301(2) and 8-302, the common-law protection extended to bona fide purchasers and has also extended, in UCC § 8-318, protection to agents who formerly went unprotected in many jurisdictions, even though they acted in good faith. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Brokerage firm which fulfilled its due diligence duties under "know your customer" rule of New York Stock Exchange (NYSE Rule 405) in accepting Government National Mortgage Association certificates from small investment adviser, who illegally used proceeds from pledge of certificates to invest in high-risk stocks, was bona fide purchaser of certificates for purposes of UCC § 8-301 and was not liable for conversion of certificates. Cumis Ins. Soc'y, Inc. v. E.F. Hutton & Co., 457 F. Supp. 1380 (S.D.N.Y. 1978).

As a general rule, a bona-fide purchaser, on receiving delivery of an investment security, prevails under UCC § 8-301 against all adverse claimants. Bona-fide purchasers, therefore, are a favored subclass of purchasers who generally prevail over all claimants, including the true owners of the securities. However, this broad statement is subject to the exception contained in UCC § 8-311, which provides that in cases of forged indorsements, a bona-fide purchaser prevails against the true owner only if he has received new, reissued, or re-registered securities from the issuer. Thus, when reconciling the broad protection extended to a bona-fide purchaser under UCC § 8-301 with the protection afforded to the true owner of the securities under UCC § 8-311, as between the owner and a bona-fide purchaser relying on a forged indorsement of pledged securities, priority is given to the owner, unless the bona-fide purchaser also received reissued stock certificates from the issuer before receiving notice of the owner's adverse claim. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201 (44), value was given for transfer of stock when father-in-law accepted stock as security for preexisting claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301, he acquired stock free of bank's adverse claim. Prisbrey v. Noble, 505 F.2d 170 (10th Cir. Utah 1974).

Where plaintiff's brother borrowed from a bank various sums pledging various securities issued in his sister's name which he had feloniously taken from her deposit box at bank, bank was "bona fide purchaser" of bearer bonds and was entitled to them. Krick v. First Nat'l Bank, 8 Ill. App. 3d 663, 290 N.E.2d 661 (1st Dist. 1972).

9. —Not bona fide purchaser.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

In action for conversion of bearer bonds which were subject of inter vivos gift to plaintiff from her husband, defendant holder of bonds, to whom plaintiff's husband had delivered bonds for safekeeping during plaintiff's illness, did not enjoy presumption of ownership from fact that bonds were in her possession, since under UCC § 8-301, on delivery of investment securities such as bonds in suit, purchaser acquires only those rights in such securities that his transferor had or had authority to convey, and in present case plaintiff's husband, after giving bonds to plaintiff, had no further rights in bonds or actual authority to convey them. Friend v. Morrow, 558 S.W.2d 780 (Mo. Ct. App. 1977).

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. Dean Witter & Co. v. Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974).

Purchasers of bank stock who, prior to the purchase, were notified of plaintiff's claim to the stock transferred were not bona fide purchasers without notice and stood in no better position than the transferor insofar as plaintiff's action to rescind the sale was concerned. Sellers v. Sellers, 428 P.2d 230 (Okla. 1967).

An issuer who takes a security in the course of performing his obligation under it is neither a bona fide nor a simple purchaser. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

10. —"Holder in due course."

A holder in due course of a negotiable instrument acquires good title even though the paper was stolen and transferred by a thief. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

11. —Rights acquired by purchaser.

Bank, who was pledgee of stock acquired by pledgors from corporate official converting same from corporation, acquires only right of its pledgor-transferor under UCC § 8-301 and does not have rights as bona fide purchaser under UCC § 8-303 since it had notice of adverse claim under UCC § 8-304 in that it willfully disregarded suspicious circumstances surrounding transfers of such stock. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

As a general rule, a bona-fide purchaser, on receiving delivery of an investment security, prevails under UCC § 8-301 against all adverse claimants. Bona-fide purchasers, therefore, are a favored subclass of purchasers who generally prevail over all claimants, including the true owners of the securities. However, this broad statement is subject to the exception contained in UCC § 8-311, which provides that in cases of forged indorsements, a bona-fide purchaser prevails against the true owner only if he has received new, reissued, or re-registered securities from the issuer. Thus, when reconciling the broad protection extended to a bona-fide purchaser under UCC § 8-301 with the protection afforded to the true owner of the securities under UCC § 8-311, as between the owner and a bona-fide purchaser relying on a forged indorsement of pledged securities, priority is given to the owner, unless the bona-fide purchaser also received reissued stock certificates from the issuer before receiving notice of the owner's adverse claim. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

In action for conversion of bearer bonds which were subject of inter vivos gift to plaintiff from her husband, defendant holder of bonds, to whom plaintiff's husband had delivered bonds for safekeeping during plaintiff's illness, did not enjoy presumption of ownership from fact that bonds were in her possession, since under UCC § 8-301, on delivery of investment securities such as bonds in suit, purchaser acquires only those rights in such securities that his transferor had or had authority to convey, and in present case plaintiff's husband, after giving bonds to plaintiff, had no further rights in bonds or actual authority to convey them. Friend v. Morrow, 558 S.W.2d 780 (Mo. Ct. App. 1977).

Where prospective purchaser of corporate stock did not acquire security interest therein where he executed promissory note for agreed price and his note together with share certificates were placed in possession of third party for safekeeping under agreement that certificates, already made out in prospective purchaser's name, would be delivered to him when note was paid, there was no evidence that prospective purchaser received any rights in stock which was alleged to have served as collateral, since there was no evidence of delivery to prospective purchaser or his agent and the fact that stock was issued in his name was insufficient to establish delivery. McCorquodale v. Holiday, Inc., 90 Nev. 67, 518 P.2d 1097 (1974).

12. Liability for conversion.

While bank-pledgee of stock has no greater rights in investment security than its pledgor-transferor had, UCC § 8-301 does not provide that purchaser assume obligations or liabilities of transferor and therefore, bank did not become converter upon acceptance of pledge and is not liable on basis of conversion measure of damages. Green v. Carbaugh, 465 F. Supp. 372 (E.D. Va. 1979).

Stockbroker who purchased stolen treasury notes from bank which sold notes on behalf of bank's customer, was purchaser in good faith under UCC §§ 8-301 and 8-304 and, thus, was not liable for conversion of notes, notwithstanding transmittal slips from bank to broker stated that transactions were for account of named person, where broker bought notes without knowledge of any suspicious circumstances from bank with whom it had been dealing over the years. United States Fid. & Guar. Co. v. Royal Nat'l Bank, 545 F.2d 1330 (2d Cir. N.Y. 1976).

Where bank loan officer acted in good faith in collateralizing bearer debentures presented by borrower and, although interest coupons had not been clipped and borrower and his corporation were total strangers to bank, where entire transaction was free from taint of suspicious circumstances sufficient to constitute constructive notice of adverse claim or to create duty on part of bank to investigate nature and quality of borrower's possession, bank was not liable for conversion of bonds. Colin v. Central Penn Nat'l Bank, 404 F. Supp. 638 (E.D. Pa. 1975), aff'd, 544 F.2d 512 (3d Cir. Pa. 1976).

13. "Transfer"; "delivery."

Stockbroker's claim for damages for conversion of corporate bond was properly denied, and its contractual claims properly held to be satisfied by return of appreciated bond and accumulated dividends where original transfer and delivery to customer was voluntary and made in normal course of business; customer became owner of bond upon its delivery to him and, from that point forward, broker had its remedy in action for price. Hayden Stone, Inc. v. Brode, 508 F.2d 895 (7th Cir. Ill. 1974).

Under UCC § 8-301, title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued $5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313 since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. Rare Earth, Inc. v. Hoorelbeke, 401 F. Supp. 26, 187 U.S.P.Q. 291, 17 UCCRS 503 (S.D.N.Y. 1975).

Under UCC § 8-309, a transfer of an investment security to a purchaser requires both indorsement and delivery of the security. However, while the requirement of physical delivery may serve a valid, evidentiary purpose in the case of a sole owner, where the security is owned by more than one person and is transferred to more than one new owner, as where it is transferred to two persons in joint tenancy, the requirement that the new owners personally receive physical possession of the stock certificates to render the transfer valid is not applicable because both joint tenants cannot enjoy possession simultaneously; (holding, where original owner transferred securities to both herself and her son in joint tenancy, that original owner's voluntary parting with control, delivery, and indorsement of the stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309 and gave owner's son an interest in the certificates that he could thereafter convey to a bona-fide purchaser, and that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant). Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Trial court erred in finding that there was no valid transfer of corporate stock from share holder to his sons where testimony at trial supported conclusion that valid transfer took place and where plaintiffs did not challenge fact that father gave sons stock certificates, but only claimed that his action did not constitute delivery; fact that father had access to vault where certificates were kept after transfer did preclude effective transfer between parties to transaction. Brener v. Industrial Steel Container Co., 303 Minn. 275, 228 N.W.2d 115 (1975).

Where defendant made telephone call from Arizona to prospective purchaser in Texas, offering to sell and soliciting subscriptions for certain securities, telephone negotiations between defendant and purchaser amounted to an "offer" to person within state of Texas and fact that sale was to be finalized in Arizona was immaterial; criminal liability attached when defendant commenced dealing in securities within state of Texas, regardless of where commercial technicality of "delivery" was effectuated under UCC. Shappley v. State, 520 S.W.2d 766 (Tenn. Crim. App. 1974).

14. Practice and procedure; burden of proof.

Broker attempting to take advantage of bona fide purchaser protection of UCC § 8-301 must demonstrate compliance with "know your customer" rule (NYSE Rule 405). Cumis Ins. Soc'y, Inc. v. E.F. Hutton & Co., 457 F. Supp. 1380 (S.D.N.Y. 1978).

Where company obtained stock that was apparently owned by its employee, sold stock and used proceeds to discharge employee's debt to company and where plaintiff brought suit to recover stock alleging that he was owner thereof, that he had loaned shares to employee and that employee's knowledge was imputable to his employer, question of fact was raised as to whether defendant company was bona fide purchaser for value; burden of proving that purchase was for value, that it was made in good faith, and made without knowing, or having reason to know, of any adverse claim, became that of defendant. Strand v. Prince-Covey & Co., 534 P.2d 892 (Utah 1975).

Stock certificates held by a bona fide purchaser for value cannot be cancelled, but one claiming to be a bona fide purchaser has the burden of proving himself to be one. Gwatney v. Allied Cos., 238 Ark. 962, 385 S.W.2d 940, 21 A.L.R.3d 958 (1965).

RESEARCH REFERENCES

ALR. Construction and application of provision restricting sale or transfer of corporate stock. 2 A.L.R.2d 745.

Pledgee's right to inspection of books and records of corporation. 15 A.L.R.2d 11.

Effectiveness, as pledge, of transfer of corporate stock. 53 A.L.R.2d 1399.

Am Jur. 12 Am. Jur. 2d, Bonds § 41.

15A Am. Jur. 2d, Commercial Code §§ 68-70, 86, 89, 95-97.

18A Am. Jur. 2d, Corporations §§ 367, 459, 461, 462, 467, 468.

Unauthorized indorsement; effect of bona fide purchase and re-registration of security, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:57.

Fraud in subscriptions to, or sale, or purchase of, shares, 7 Am. Jur. Pl & Pr Forms (Rev), Corporations, Forms 111-119.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:121, 8:126.

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2811 et seq. (investment securities, transfer of).

CJS. 18 C.J.S., Corporations §§ 191, 350, 670.

19 C.J.S., Corporations § 755.

§ 75-8-303. Protected purchaser.

(a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

(1) Gives value;

(2) Does not have notice of any adverse claim to the security; and

(3) Obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

SOURCES: Laws, 1996, ch. 468 § 30, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-303 [Codes, 1942, § 41A:8-303; Laws, 1966, ch. 316, § 8-303; 1990, ch. 384, § 18, eff from and after July 1, 1990], which defined "broker," was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The definition is now included in § 75-8-102.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Notice of adverse claims, see § 75-8-105.

Status and rights of party receiving security without necessary endorsement, see § 75-8-304.

Time of notice of defects in issue of security or defense of issuer, see 75-8-203.

Protection of purchasers of instruments and documents, see § 75-9-309.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-8-302.
6. In general.
7. "Bona fide purchaser."
8. —Value given.
9. —Not bona fide purchaser.
10. —Notice of invalidity.
11. Practice and procedure; burden of proof.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-302.

6. In general.

The Code replaces the Uniform Stock Transfer Act in defining what constitutes value for the purpose of the transfer of shares of stock. Fried v. Margolis, 296 F.2d 670 (2d Cir. N.Y. 1961), rev'd on other grounds sub nom. Wolf v. Weinstein, 372 U.S. 633, 83 S. Ct. 969, 10 L. Ed. 2d 33 (1963), reh'g denied, 373 U.S. 928, 83 S. Ct. 1522, 10 L. Ed. 2d 427 (1963).

7. "Bona fide purchaser."

In suit by owner of stolen treasury bills against bank and its officers for conversion, where (1) owner on July 21, 1970, discovered that bills had been stolen from owner's premises by unknown person, (2) next person known to possess bills was person known to defendants, (3) such person, on discharging loan made by defendant bank, delivered the stolen bills in envelope on August 10, 1970, to one of bank's officers without exchange of receipts or proof of such person's ownership of bills, and (4) bills were later redeemed by bank only because they had not been reported missing to district Federal reserve bank or United States Treasury Department, court held (1) that resolution of case depended on fact issue of bona fides of transfer of bills from third person to bank, (2) that such transfer would either entitle or deprive bank of protective status of bona fide purchaser under UCC § 8-301 and § 8-302, and (3) that since district court had wrongfully placed on owner of stolen bills burden of proving that bank was not bona fide purchaser, such ruling unwarrantedly influenced district court's ultimate findings of fact. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Where (1) municipal bond dealer, prior to filing against it of involuntary petition in bankruptcy, (a) sold certain bonds to customer, (b) sent customer's nominee confirmation tickets concerning such sale, and (c) sent properly completed confirmation and delivery tickets concerning sale to defendant municipal-bond clearing facility in order to effectuate delivery of bonds to dealer's customer, and where (2) defendant clearing facility physically allocated specific bond certificates corresponding to dealer's instructions and recorded explicitly identifying information on bonds' delivery forms (including certificate numbers and name of dealer's customer), activities of dealer and defendant clearing facility constituted sufficient identification, "by book entry or otherwise," of bonds sold to customer under UCC § 8-313, and dealer, by virtue of its contractual relationship with clearing facility, was not required by UCC § 8-313 to have actual physical possession of certificates. Matthysse v. Securities Processing Servs., Inc., 444 F. Supp. 1009, 23 U.C.C. Rep. Serv. 435 (S.D.N.Y. 1977) (applying New York law; holding that possession of customer's bonds by clearing facility was sufficient to satisfy broker's possession requirement under UCC § 8-313, and that under UCC § 8-302, customer was bona-fide purchaser of bonds who took them free of clearing facility's adverse claim thereto).

Bank exercised good faith in purchase of 16 stolen treasury bills and was bona fide purchaser thereof within meaning of UCC § 8-302 where (1) bills were presented to bank during one-month period by two persons who were well-known customers of bank, (2) such persons had recently cashed two valid treasury bills at bank and validity of such bills had been confirmed by federal reserve bank, (3) stolen bills were in bearer form and nothing on their face indicated that they were invalid, and (4) bank purchased all 16 bills before it received any notice that any of them had been stolen. Morgan Guar. Trust Co. v. New England Merchants Nat'l Bank, 438 F. Supp. 97 (D. Mass. 1977).

In action to recover value of stock certificates which were stolen from broker, accepted by bank as collateral for loan, and subsequently sold to satisfy debt, testimony by bank president that, inter alia, prospective borrower offered certificates as collateral for loan, that certificates were issued to and endorsed by broker with transferee's name left blank, that borrower executed affidavit stating that he was rightful owner of certificates, that bank contacted issuing corporation and verified listing of stock in broker's name, and that bank sent certificates with borrower's name added as transferee to issuing corporation for issuance of new certificates in borrower's name, which were issued and held by bank, established prima case that bank was bona fide purchaser of stock certificates under UCC § 8-302; bank became "purchaser for value" when it accepted stock certificates as collateral. Fidelity & Cas. Co. v. Key Biscayne Bank, 501 F.2d 1322 (5th Cir. Fla. 1974), reh'g denied, 504 F.2d 760 (5th Cir. Fla. 1974).

Where plaintiff's brother borrowed from a bank various sums pledging various securities issued in his sister's name which he had feloniously taken from her deposit box at bank, bank was "bona fide purchaser" of bearer bonds and was entitled to them. Krick v. First Nat'l Bank, 8 Ill. App. 3d 663, 290 N.E.2d 661 (1st Dist. 1972).

8. —Value given.

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201 (44), value was given for transfer of stock when father-in-law accepted stock as security for preexisting claim-debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301, he acquired stock free of bank's adverse claim. Prisbrey v. Noble, 505 F.2d 170 (10th Cir. Utah 1974).

Brokerage firm which received stock for account of customer and promptly credited sales price to customer's account acquired stock in partial satisfaction of preexisting claim (UCC § 1-201, subd 44(b)), and thus for value within meaning of UCC § 8-302. Colonial Sec., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 461 F. Supp. 1159 (S.D.N.Y. 1978).

9. —Not bona fide purchaser.

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. Dean Witter & Co. v. Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974).

Judgment creditor who purchased shares of stock at sheriff's sale was not "bona fide purchaser" under UCC § 8-302 since she was not "purchaser" and did not take by "delivery"; therefore, she was not entitled to registration of transfer under UCC § 8-405 where securities had previously been lost and replaced by issuer. Mazer v. Williams Bros. Co., 461 Pa. 587, 337 A.2d 559, 88 A.L.R.3d 942 (1975).

Commercial factor, who took possession of bearer bond as security for noninterest-bearing loan, which had no certain date for repayment and was made to individual with whom lender had had no prior personal transactions, was not a bona fide purchaser for value as against true owner of bond, which had been stolen. Brown v. Rosetti, 66 Misc. 2d 239 (1971).

10. —Notice of invalidity.

Bank was not bona fide purchaser within meaning of UCC § 8-302 and was liable for conversion of stolen treasury bills, where owner notified bank of loss but bank did not make reasonable efforts to advise its discount and collateral department of existence of lost securities file, and where bank subsequently took bills as collateral for loans. The test of sufficiency of notice is objective one under UCC § 1-201(27) and not whether or not individuals involved were in fact aware of notice. Morgan Guar. Trust Co. v. Third Nat'l Bank, 529 F.2d 1141 (1st Cir. Mass. 1976).

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in good faith. Folsom v. Security Nat'l Bank, 32 Colo. App. 91, 507 P.2d 1114 (1973).

11. Practice and procedure; burden of proof.

In suit by owner of stolen treasury bills against bank and its officers for conversion, where (1) owner on July 21, 1970, discovered that bills had been stolen from owner's premises by unknown person, (2) next person known to possess bills was person known to defendants, (3) such person, on discharging loan made by defendant bank, delivered the stolen bills in envelope on August 10, 1970, to one of bank's officers without exchange of receipts or proof of such person's ownership of bills, and (4) bills were later redeemed by bank only because they had not been reported missing to district Federal reserve bank or United States Treasury Department, court held (1) that resolution of case depended on fact issue of bona fides of transfer of bills from third person to bank, (2) that such transfer would either entitle or deprive bank of protective status of bona fide purchaser under UCC § 8-301 and § 8-302, and (3) that since district court had wrongfully placed on owner of stolen bills burden of proving that bank was not bona fide purchaser, such ruling unwarrantedly influenced district court's ultimate findings of fact. Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

Where company obtained stock that was apparently owned by its employee, sold stock and used proceeds to discharge employee's debt to company and where plaintiff brought suit to recover stock alleging that he was owner thereof, that he had loaned shares to employee and that employee's knowledge was imputable to his employer, question of fact was raised as to whether defendant company was bona fide purchaser for value; burden of proving that purchase was for value, that it was made in good faith, and made without knowing, or having reason to know, of any adverse claim, became that of defendant. Strand v. Prince-Covey & Co., 534 P.2d 892 (Utah 1975).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. Hollywood Nat'l Bank v. IBM, 38 Cal. App. 3d 607 (2d Dist. 1974).

RESEARCH REFERENCES

ALR. Who is a "bona fide purchaser" of investment security under UCC § 8-302. 88 A.L.R.3d 949.

Am Jur. 12 Am. Jur. 2d, Bonds §§ 27, 34.

15A Am. Jur. 2d, Commercial Code §§ 68-70, 89, 95, 96.

18A Am. Jur. 2d, Corporations §§ 305, 407, 459 et seq.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:54-8:57.

CJS. 18 C.J.S., Corporations § 191.

19 C.J.S., Corporations §§ 751, 752, 755, 756.

§ 75-8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in Section 75-8-108 and not an obligation that the security will be honored by the issuer.

SOURCES: Laws, 1996, ch. 468 § 31, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-304 [Codes, 1942, § 41A:8-304; Laws, 1966, ch. 316, § 8-304; 1990, ch. 384, § 19, eff from and after July 1, 1990], pertaining to notice to purchaser of adverse claims, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-105.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Right of transferee of negotiable document of title not containing endorsement, see § 75-7-506.

Notice of defect or defense, see § 75-8-202.

Requisite showing on security of restriction on its transfer, see § 75-8-204.

Rights and title acquired by purchaser, see § 75-8-302.

What constitutes a protected purchaser, see § 75-8-303.

Effect of guaranteeing endorsement, see § 75-8-306.

Purchaser's right to requisites for registration of transfer on books, see § 75-8-307.

Registration of securities, see § 75-8-401 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-307.

6. In general.

III. Under Former § 75-8-308.

7. In general.
8. Indorsement and delivery.

IV. Under Former § 75-8-309.

9. In general.
10. Indorsement and delivery.
11. Actions involving stolen securities.

V. Under Former § 75-8-311.

12. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-307.

6. In general.

Where husband and wife each offered to purchase 50 shares of stock in corporation for specified purchase price, offers were accepted by corporation's board of directors, and consideration for issuance of all such shares was provided by husband, under UCC § 8-307, a gift to wife by husband of 50 shares of stock was effected, and such gift was not invalidated by corporation's subsequent failure to comply fully with statutory formalities for issuance of stock certificates representing such shares. Ashley v. Ashley, 482 Pa. 228, 393 A.2d 637 (1978).

Where husband physically delivered stock certificate to wife with intention of making gift, transfer was complete even though certificate was not endorsed. Rogers v. Rogers, 271 Md. 603, 319 A.2d 119 (1974).

Holder of promissory notes to whom unendorsed stock certificate was pledged as collateral security has the right to compel the pledgor to endorse the certificate and could obtain title to certificate on books of corporation, for as against the transferor the transfer of the security was complete upon delivery even though no endorsement appeared thereon. Goldammer v. Fredricks (In re Jorgensen's Estate), 70 Ill. App. 2d 398, 217 N.E.2d 290 (1st Dist. 1966).

III. Under Former § 75-8-308.

7. In general.

There is no liability imposed on an accommodation endorser to a guarantor. Thus, an accommodation endorser owes no duty to a guarantor in the event that the guarantor, who has the liability of a co-maker, pays the note's holder; however, this does not preclude an accommodation endorser and a guarantor from agreeing or contracting privately as to their liability. Comfort Eng'g Co. v. Kinsey, 523 So. 2d 1019 (Miss. 1988).

One acquiring shares of stock by delivery after indorsement in blank has the right, as the holder, to convert the blank indorsement into a special indorsement by designating himself as the transferee. Morrison v. Liberty Disct. & Sav. Bank, 61 Lack. Jur. 37 (Pa. 1960).

8. Indorsement and delivery.

Indorsement and delivery of stock certificate completed gift; donee became owner of stock at that moment; subsequent location of certificate itself or fact that stock was not transferred on corporate records cannot alter that fait accompli. Toigo v. Ross, 107 Ill. App. 2d 395, 246 N.E.2d 68 (2d Dist. 1969).

IV. Under Former § 75-8-309.

9. In general.

Under UCC § 8-301(1), title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued $ 5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313(1)(a) since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. Rare Earth, Inc. v. Hoorelbeke, 401 F. Supp. 26, 187 U.S.P.Q. 291, 17 UCCRS 503 (S.D.N.Y. 1975).

10. Indorsement and delivery.

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301, (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311 could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Under UCC § 8-309, a transfer of an investment security to a purchaser requires both indorsement and delivery of the security. However, while the requirement of physical delivery may serve a valid, evidentiary purpose in the case of a sole owner, where the security is owned by more than one person and is transferred to more than one new owner, as where it is transferred to two persons in joint tenancy, the requirement that the new owners personally receive physical possession of the stock certificates to render the transfer valid is not applicable because both joint tenants cannot enjoy possession simultaneously. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Holding, where original owner transferred securities to both herself and her son in joint tenancy, that original owner's voluntary parting with control, delivery, and indorsement of the stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309 and gave owner's son an interest in the certificates that he could thereafter convey to a bona-fide purchaser, and that under UCC § 8-301, son's interest in certificates was limited to that of a joint tenant. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Although a transfer of stock requires delivery under UCC § 8-309, title may pass by constructive delivery. Thus, if the parties so intend, title to stock passes to the buyer by delivery to an escrow agent for ultimate delivery to the buyer on payment of the purchase price or part thereof. Application of Stewart Becker, Ltd., 1978, 94 Misc. 2d 766, 405 N.Y.S.2d 571.

When aunt caused stock to be issued in joint names with nephew and niece, respectively, and when delivery of new certificates was made to aunt, requirements of UCC § 8-309, stating that endorsement does not constitute transfer until delivery of security, and 8-313, stating that delivery to purchaser occurs when he or persons designated by him acquires possession, were met notwithstanding physical delivery of stock certificates was not made to nephew or niece. Robison v. Fickle, 167 Ind. App. 651, 340 N.E.2d 824 (1976).

Under UCC § 8-301(1), title to stock passed to corporation where transferor endorsed stock certificate in blank and delivered it to attorney who served as counsel to both corporation and transferor and who in turn delivered certificate to another corporate functionary, and where corporation issued $ 5000 check to transferor, in amount equal to his original contribution to capital, although balance of purchase price, total amount of which could not exceed value of shares, remained for future determination; there was delivery of certificate under UCC § 8-313(1)(a) since transferor voluntarily parted with certificate with intent that corporation assume ownership; payment of purchase price was not necessary to passage of title and, once delivery had occurred, transferor was divested of title and, if payment was not forthcoming, he had cause of action to recover outstanding balance of purchase price or actual value of stock. Rare Earth, Inc. v. Hoorelbeke, 401 F. Supp. 26, 187 U.S.P.Q. 291, 17 UCCRS 503 (S.D.N.Y. 1975).

Fact that stockholder endorsed in blank certificates with the intention of giving them as Christmas presents to his children was not effective to transfer ownership of the shares represented by the certificates, and where certificates remained undelivered at time of stockholder's death the endorsements did not serve to reduce the number of shares he owned at that time. Whitfield v. Metropolitan Life Ins. Co., 262 F. Supp. 977 (W.D. Ark. 1967).

A stock certificate properly endorsed and delivered as an absolute gift to the donee is "transferred," even though transfer was not made on books of issuing corporation prior to donor's death. In re Ruszkowski's Estate, 45 Misc. 2d 380 (1965).

Held that under above statute title to unindorsed securities may be transferred by delivery. In re Ruszkowski's Estate, 45 Misc. 2d 380 (1965).

11. Actions involving stolen securities.

When a stockbroker is sued by the true owner of shares for conversion when the broker received the shares from a thief and paid the proceeds of the sale to the thief or his confederate, it is no defense that the owner of the shares may have been negligent in handling them. Hartford Accident & Indem. Co. v. Walston & Co., 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

V. Under Former § 75-8-311.

12. In general.

While providing a remedy for the owners of misappropriated securities in UCC § 8-315, the Uniform Commercial Code does not foreclose recourse to an action at law for conversion (see Official Comment 2 to UCC § 8-315). However, the code has codified, in UCC §§ 8-301(2) and 8-302, the common-law protection extended to bona fide purchasers and has also extended, in UCC § 8-318, protection to agents who formerly went unprotected in many jurisdictions, even though they acted in good faith.. (construing Illinois law). Oscar Gruss & Son v. First State Bank, 24 UCCRS 1251, 582 F.2d 424 (7th Cir. Ill. 1978).

In action by surviving joint tenant to recover possession of jointly held stock certificates from bank to which they had been pledged by deceased joint tenant, where (1) certificates had been transferred from plaintiff, as original sole owner thereof, to both plaintiff and her deceased son as joint tenants with right of survivorship, (2) son without plaintiff's knowledge had pledged certificates as collateral for loan made by defendant bank, (3) son had forged plaintiff's signature on stock power indorsing certificates to bank, and (4) bank had not registered transfer of certificates with issuer or received new, reissued, or re-registered certificates from issuer, court held (1) that bank was bona-fide purchaser of the pledged securities under UCC § 8-301(2), (2) that since son had forged plaintiff's indorsement to promissory note, pledge instrument, and stock power on pledging securities to bank, and since bank had not received new, reissued, or re-registered securities from issuer, bank under UCC § 8-311(a) could not assert rights in securities against plaintiff because of the forged indorsement, (3) that plaintiff's voluntary parting with control, delivery, and indorsement of stock certificates to issuer satisfied delivery and indorsement requirements of UCC § 8-309, and gave son interest in certificates that he could thereafter convey to bona-fide purchaser (bank), (4) that under UCC § 8-301(3), son's interest in certificates was limited to that of a joint tenant, and (5) that since joint tenancy of plaintiff and her son in certificates was not severed prior to termination of such tenancy by son's death (which prior termination would have given plaintiff and her son equal one-half interests in certificates as tenants in common), bank (a) took as security for its loan only son's joint interest in certificates, (b) such interest was extinguished when son failed to survive plaintiff, and (c) bank had no interest in certificates that could be enforced against plaintiff because title to certificates, at instant of son's death, vested solely in plaintiff under joint tenancy right of survivorship. Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

As a general rule, a bona-fide purchaser, on receiving delivery of an investment security, prevails under UCC § 8-301(2) against all adverse claimants. Bona-fide purchasers, therefore, are a favored subclass of purchasers who generally prevail over all claimants, including the true owners of the securities. However, this broad statement is subject to the exception contained in UCC § 8-311(a), which provides that in cases of forged indorsements, a bona-fide purchaser prevails against the true owner only if he has received new, reissued, or re-registered securities from the issuer. Thus, when reconciling the broad protection extended to a bona-fide purchaser under UCC § 8-301(2) with the protection afforded to the true owner of the securities under UCC § 8-311(a), as between the owner and a bona-fide purchaser relying on a forged indorsement of pledged securities, priority is given to the owner, unless the bona-fide purchaser also received reissued stock certificates from the issuer before receiving notice of the owner's adverse claim.. (stating that priority extended to true owner of forged stock certificates includes right to reclaim possession of the securities from a bona-fide purchaser). Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Under UCC § 8-311(a), the true owner of an investment security, with certain exceptions, may assert the ineffectiveness of an "unauthorized indorsement" that appears on pledged securities against a bona-fide purchaser, unless the bona-fide purchaser has received new, reissued, or re-registered securities from the issuer. Under UCC § 1-201(43), the "unauthorized indorsement" referred to in UCC § 8-311 "means one made without actual, implied, or apparent authority and includes a forgery." Ogilvie v. Idaho Bank & Trust Co., 24 UCCRS 1267, 582 P.2d 215 (1978).

Where broker purchased 1,000 shares of stock for customer who paid full purchase price therefor, issuer issued ten certificates for 100 shares each in customer's name and delivered certificates to broker, broker using stock powers bearing forged signatures sold shares to bona fide purchaser, forged signatures were guaranteed by bank which had no knowledge of broker's fraudulent conversion of shares and receipt of proceeds of sale thereof, and issuer issued new certificates to bona fide purchaser, (1) issuer was liable to customer under UCC § 8-311(b) for registering transfer of customer's shares on unauthorized indorsement, and (2) issuer under UCC § 8-404(2) was required to issue new certificates to customer. Securities & Exchange Com. v Albert & Maguire Secur. Co. (1977, CA3) 560 F2d 569, 22 UCCRS 1055 (construing Pennsylvania law and stating that customer in such case had cause of action for partial reimbursement against broker's trustee in liquidation proceedings under federal Securities Investor Protection Act of 1970, that customer also had cause of action under UCC for full reimbursement for his loss, and that not surprisingly, customer elected to obtain full compensation under UCC).

Although UCC Art 8 gives to true owner of securities which have been transferred on unauthorized indorsement remedies against issuer of securities (see UCC § 8-311) and ultimate purchaser thereof (see UCC §§ 8-311(a) and 8-315), Art 8 apparently does not provide any right of action in favor of true owner against broker who consummated such transfer. However, the Uniform Commercial Code is by its own terms complementary to the common law, except where there is a conflict between the two. Thus, where husband, during wife's lifetime but without her authority, delivered stock certificates belonging to wife, along with stock-assignment instruments bearing wife's forged signature, to broker for sale and broker sold such securities, wife's executor could bring common-law cause of action for conversion against broker. North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

In action seeking replacement from corporations of securities as to which defendants had allegedly improperly registered transfers on forged indorsements: (1) trial court erred in applying provisions of UCC § 8-105(2)(b), that signatures on securities were "presumed to be genuine or authorized", where evidence was overwhelming that signatures were forged in furtherance of scheme by third parties, who had stolen certificates, to negotiate stock to others; (2) trial court also erred in finding that plaintiffs were "otherwise precluded" under UCC § 8-311, from asserting an effectiveness of transfers where, other than separate finding that plaintiffs were precluded from recovery by unreasonable delay in notifying issuers, record contained no evidence of conduct by the plaintiffs that would preclude recovery; (3) trial court's findings were inadequate on issue whether plaintiffs had notified issuers as to missing securities "within a reasonable time", as required by UCC § 8-405, after they had notice certificates were missing, where, though evidence amply supported court's finding as to date plaintiffs had notice of loss, it did not support further findings that letter sent to defendants some 41 days later was insufficient to notify them of loss, and that more than another month elapsed before adequate notice was given, and where court made no finding as to whether 41-day delay was unreasonable. Ibanez v. Farmers Underwriters Ass'n, 14 Cal. 3d 390, 534 P.2d 1336 (1975).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law of Rhode Island, plaintiff alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent: (1) under UCC § 8-102 transfer of stock certificates by transfer agent of issuer was investment security transaction within contemplation of Article 8 of UCC, and under UCC § 8-106 rights and duties of issuer with respect to such transfer were governed by law, including conflicts of laws rules, of jurisdiction of organization of issuer, i.e., Rhode Island; (2) since Rhode Island conflicts of laws rules made Oklahoma statute of limitations applicable and since plaintiff's action to enforce liability of corporation for improper registration of her stock under UCC § 8-311 was not limited by any specific provision of Oklahoma statute of limitations, it was limited by general provision providing five year limitation period for actions not otherwise provided for in statute. Reinhard v. Textron, Inc., 516 P.2d 1325 (Okla. 1973).

The term "such person," as used in UCC § 8-312(3) cannot be held to include the true owner, since he has neither taken nor dealt with the security in reliance on the guarantee, and thus the executor of the estate of the owner of certain securities which were transferred upon a forged indorsement prior to the death of the owner could not proceed under such section against a stockbroker which had guaranteed the forged signatures. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 479 F.2d 478 (6th Cir. Ohio 1973).

Stock certificates' true owner whose forged signature was guaranteed by stock brokerage firm was not one of those encompassed within protective language of signature guarantee provision of UCC. Lowes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 74 Misc. 2d 875, 344 N.Y.S.2d 55 (NY 1973).

Under Code provision stating that delivery occurs when person acquires possession of securities, 'possession' cannot pass where shares allegedly possessed are not even in existence. Kaufman v. Diversified Indus., Inc., 460 F.2d 1331 (2d Cir. N.Y. 1972), (applying New York law) cert. denied, 409 U.S. 1038, 93 S. Ct. 517, 34 L. Ed. 2d 487 (1972), on remand, 356 F. Supp. 827 (S.D.N.Y. 1973).

Where bank in which plaintiff rented safety deposit box had means by which it could readily verify authenticity of endorsements appearing on plaintiff's securities but negligently failed to do so, fact that plaintiff's brother had access to deposit box and was thereby able to obtain possession of plaintiff's securities did not give rise to cloak of apparent authority, and plaintiff was not precluded from asserting ineffectiveness of her brother's signature. Krick v. First Nat'l Bank, 8 Ill. App. 3d 663, 290 N.E.2d 661 (1st Dist. 1972).

RESEARCH REFERENCES

ALR. Necessity of delivery of stock certificate to complete valid gift of stock. 23 A.L.R.2d 1171.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 196.

15A Am. Jur. 2d, Commercial Code §§ 103-105.

18A Am. Jur. 2d, Corporations §§ 283, 449, 454-456, 476, 477.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:41, 8:42 (duty to indorse).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, § 253:2831 et seq (indorsements).

CJS. 18 C.J.S., Corporations § 294 et seq.

§ 75-8-305. Instruction.

(a) If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.

(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by Section 75-8-108 and not an obligation that the security will be honored by the issuer.

SOURCES: Laws, 1996, ch. 468 § 32, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-305 [Codes, 1942, § 41A:8-305; Laws, 1966, ch. 316, § 8-305; 1990, ch. 384, § 20, eff from and after July 1, 1990], pertaining to staleness as notice of adverse claims, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-105.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) The signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) The signature was genuine;

(2) The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) The signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) and also warrants that at the time the instruction is presented to the issuer:

(1) The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) The transfer of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

(d) A guarantor under subsections (a) and (b) or a special guarantor under subsection (c) does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

SOURCES: Laws, 1996, ch. 468 § 33, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-306 [Codes, 1942, § 41A:8-306; Laws, 1966, ch. 316, § 8-306; 1990, ch. 384, § 21, eff from and after July 1, 1990], pertaining to warranties on presentment and transfer, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-306. See also § 75-8-108.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Registration of transfers, see § 75-8-401 et seq.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-306.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-306.

6. In general.

In action by trustee of securities against issuer for registering transfer without plaintiff's indorsement, where evidence showed (1) that plaintiff's son had stolen securities in suit and then, in conspiracy with manager of branch of cross-defendant bank, had forged plaintiff's signature on stock powers relating to securities, (2) that bank's branch manager had subsequently affixed bank's guarantee to such securities with knowledge that plaintiff's signature thereon was forged, and (3) that such fraudulently indorsed stock powers had then been delivered to cross complainant broker who, allegedly relying on bank's guarantee of plaintiff's signature, also guaranteed such signature and transmitted stock powers to issuer to effect transfer of securities, court held, on broker's crossclaim against bank under UCC § 8-312, dealing with liability of person guaranteeing signature of indorser of security, that since no issue as to genuineness of the guarantee or knowledge of broker as to true facts involved had been raised by bank on broker's motion for summary judgment against bank, such motion would be granted. Pless v. CPC Int'l, Inc., 82 F.R.D. 105 (W.D. Pa. 1979).

UCC § 8-312 does not impose strict liability on the guarantors of signatures and indorsements on securities. Flying Diamond Corp. v. Pennaluna & Co., 586 F.2d 707 (9th Cir. Idaho 1978).

UCC § 8-312 sets forth two prerequisites, reliance and proximate cause, to the imposition of liability under UCC § 8-312. Flying Diamond Corp. v. Pennaluna & Co., 586 F.2d 707 (9th Cir. Idaho 1978).

Issuer of stock was not entitled to rely, under UCC § 8-312, on guarantees by broker and bank of signatures and indorsements on stock certificates in case involving transfer of unauthorized certificates of issuer with forged indorsements where issuer, although having had reason to know that certificates, indorser signatures thereon, and guarantees of such signatures were improper, still did not exercise due diligence in the matter. In such case, proximate cause of issuer's resulting loss was its own conduct in entrusting stock-transfer agent with blank certificates that contained facsimile signatures of issuer's president and secretary and in failing to take proper precautions after learning of theft of such certificates by transfer agent's president. Flying Diamond Corp. v. Pennaluna & Co., 586 F.2d 707 (9th Cir. Idaho 1978).

Where (1) first creditor, after making motel construction loan to debtor, obtained security agreement with after-acquired property clause that applied to all after-acquired furniture, furnishings, appliances, and equipment used to operate motel, (2) first creditor filed financing statement in chancery clerk's office in county where motel was located, but allegedly did not file such statement with secretary of state, and (3) second creditor (bank) had knowledge of first creditor's financing statement, court held (1) that record, although not conclusive, was persuasive that financing statement had been filed by first creditor with secretary of state, as required by UCC § 9-401, and (2) since second creditor knew about first creditor's financing statement, first creditor therefore, under express provisions of UCC § 9-401, had properly secured its interest in after-acquired personal property in debtor's motel. First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978).

UCC § 8-312, dealing with effect of guaranteeing signatures or indorsements, is intended to protect subsequent transferees and purchasers, who are described in UCC § 8-312 as "any person taking or dealing with the security in reliance on the guarantee." However, UCC § 8-312 does not preclude owners or others from pursuing different types of remedies, since UCC § 8-315 provides that any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may have damages against anyone except the bona-fide purchaser. Roth v. Roth, 571 S.W.2d 659, 5 A.L.R.4th 350 (Mo. Ct. App. 1978).

Plaintiff's complaint did not allege knowledge or connivance on part of defendants in alleged scheme to defraud; in sections of complaint alleging conspiracy to defraud, plaintiff does not name these defendants; held, plaintiff fails to state claim within asserted knowledge exception to UCC § 8-312 rule that guarantee of signature on securities document inures only to those "taking or dealing with the security in reliance on the guarantee." Wood v. Wood, 312 F. Supp. 762 (S.D.N.Y. 1970).

RESEARCH REFERENCES

Am Jur. 18A Am. Jur. 2d, Corporations §§ 240, 245, 407, 463-465.

Guarantee of signature of indorser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:71.

CJS. 18 C.J.S., Corporations § 309.

38A C.J.S., Guaranty § 55 et seq.

§ 75-8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

SOURCES: Laws, 1996, ch. 468 § 34, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-307 [Codes, 1942, § 41A:8-307; Laws, 1966, ch. 316, § 8-307; 1990, ch. 384, § 22, eff from and after July 1, 1990], pertaining to the effect of delivery without indorsement and the right to compel indorsement, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-304.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effect of delivery without endorsement, see § 75-8-304.

When issuer under duty to register transfer of security, see § 75-8-401.

Right of issuer to require that endorsements are effective, see § 75-8-402.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 90.

18A Am. Jur. 2d, Corporations § 245.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:122.

Right of purchaser to demand transferor prove authority to transfer, 19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8-Investment Securities, § 253:2841 et seq.

§§ 75-8-308 through 75-8-321. Repealed.

Repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996.

§ 75-8-308. [Codes, 1942, § 41A:8-308; Laws, 1966, ch. 316, § 8-308; Laws 1990, ch. 384, § 23]

§ 75-8-309. [Codes, 1942, § 41A:8-309; Laws, 1966, ch. 316, § 8-309; Laws, 1990, ch. 384, § 24]

§ 75-8-310. [Codes, 1942, § 41A:8-310; Laws, 1966, ch. 316, § 8-310; Laws, 1990, ch. 384, § 25]

§ 75-8-311. [Codes, 1942, § 41A:8-311; Laws, 1966, ch. 316, § 8-311; Laws, 1990, ch. 384, § 26]

§ 75-8-312. [Codes, 1942, § 41A:8-312; Laws, 1966, ch. 316, § 8-312; Laws, 1990, ch. 384, § 27]

§ 75-8-313. [Codes, 1942, § 41A:8-313; Laws, 1966, ch. 316, § 8-313; Laws, 1990, ch. 384, § 28]

§ 75-8-314. [Codes, 1942, § 41A:8-314; Laws, 1966, ch. 316, § 8-314; Laws, 1990, ch. 384, § 29]

§ 75-8-315. [Codes, 1942, § 41A:8-315; Laws, 1966, ch. 316, § 8-315; Laws, 1990, ch. 384, § 30]

§ 75-8-316. [Codes, 1942, § 41A:8-316; Laws, 1966, ch. 316, § 8-316;Laws, 1990, ch. 384, § 31]

§ 75-8-317. [Codes, 1942, § 41A:8-317; Laws, 1966, ch. 316, § 8-317; Laws, 1990, ch. 384, § 32]

§ 75-8-318. [Codes, 1942, § 41A:8-318; Laws, 1966, ch. 316, § 8-318; Laws, 1990, ch. 384, § 33]

§ 75-8-319. [Codes, 1942, § 41A:8-319; Laws, 1966, ch. 316, § 8-319; Laws, 1990, ch. 384, § 34]

§ 75-8-320. [Codes, 1942, § 41A:8-320; Laws, 1966, ch. 316, § 8-320; Laws, 1990, ch. 384, § 35]

§ 75-8-321. [Laws, 1990, ch. 384, § 36]

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Former § 75-8-308 was entitled: Indorsement, how made; special indorsement; indorser not a guarantor; partial assignment. For present similar provisions, see §§ 75-8-102, 75-8-107, 75-8-304 and 75-8-305.

Former § 75-8-309 was entitled: Effect of indorsement without delivery. For present similar provision, see § 75-8-304.

Former § 75-8-310 was entitled: Indorsement of security in bearer form. For present similar provision, see § 75-8-304.

Former § 75-8-311 was entitled: Effect of unauthorized indorsement. For present similar provision, see §§ 75-8-304 and 75-8-404.

Former § 75-8-312 was entitled: Effect of guaranteeing signature or endorsement. For present similar provision, see § 75-8-306.

Former § 75-8-313 was entitled: When transfer of security or limited interest occurs. The provisions of former § 75-8-313 were omitted from Revised Article 8.

Former § 75-8-314 was entitled: Fulfilling duty to transfer; when completed. The provisions of former § 75-8-314 were omitted from Revised Article 8.

Former § 75-8-315 was entitled: Action against purchaser based upon wrongful transfer. The provisions of former § 75-8-315 were omitted from Revised Article 8.

Former § 75-8-316 was entitled: Purchaser's right to requisites for registration of transfer on books. For present similar provision, see § 75-8-307.

Former § 75-8-317 was entitled: Attachment or levy upon security. For present similar provision, see § 75-8-112.

Former § 75-8-318 was entitled: No conversion by good faith delivery. For present similar provision, see § 75-8-115.

Former § 75-8-319 was entitled: Statute of frauds. The provisions of former § 75-8-319 were omitted from Revised Article 8.

Former § 75-8-320 was entitled: Transfer or pledge within a central depository system. The provisions of former § 75-8-320 were omitted from Revised Article 8.

Former § 75-8-321 was entitled: Enforcement of security interest in a security; termination of security interest; effective date. The provisions of former § 75-8-321 were omitted from Revised Article 8.

PART 4.

REGISTRATION.

Sec.	
75-8-401.	Duty of issuer to register transfer.
75-8-402.	Assurance that indorsement or instruction is effective.
75-8-403.	Demand that issuer not register transfer.
75-8-404.	Wrongful registration.
75-8-405.	Replacement of lost, destroyed, or wrongfully taken security certificate.
75-8-406.	Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.
75-8-407.	Authenticating trustee, transfer agent, and registrar.
75-8-408.	Repealed.

§ 75-8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) The indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) Reasonable assurance is given that the indorsement or instruction is genuine and authorized (Section 75-8-402);

(4) Any applicable law relating to the collection of taxes has been complied with;

(5) the transfer does not violate any restriction on transfer imposed by the issuer in accordance with Section 75-8-204;

(6) A demand that the issuer not register transfer has not become effective under Section 75-8-403, or the issuer has complied with Section 75-8-403(b) but no legal process or indemnity bond is obtained as provided in Section 8-403(d); and

(7) The transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

SOURCES: Laws, 1996, ch. 468 § 35, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-401 [Codes, 1942, § 41A:8-401; Laws, 1966, ch. 316, § 8-401; 1990, ch. 384, § 37, eff from and after July 1, 1990], pertaining to the duty of an issuer to register transfer, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-401.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Conflict of laws, see § 75-8-110.

Effect of issuer's restrictions on transfer, see § 75-8-204.

Rights and title acquired by purchaser, see § 75-8-302.

Duty of authenticating trustee, transfer agent or registrar, see 75-8-407.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-401.

6. In general; duty to register.
7. Knowledge of invalidity.
8. —Duty to inquire.
9. Restrictive transfer legend.
10. —Refusal to remove.
11. Practice and procedure.
12. —Burden of proof.
13. —Damages and costs.
14. —Standing.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-401.

6. In general; duty to register.

UCC § 8-401 requires indorsement and presentation of stock certificate to issuing corporation as conditions precedent to issuer's obligation to register transfer of ownership of shares represented by such certificate. Wanland v. C.E. Thompson Co., 64 Ill. App. 3d 46, 380 N.E.2d 1012 (1st Dist. 1978).

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and precluded summary judgment in their favor. DeWitt v. American Stock Transf. Co., 440 F. Supp. 1084 (S.D.N.Y. 1977).

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in good faith. Folsom v. Security Nat'l Bank, 32 Colo. App. 91, 507 P.2d 1114 (1973).

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. Kanton v. United States Plastics, Inc., 248 F. Supp. 353 (D.N.J. 1965).

7. Knowledge of invalidity.

Bank was justified in refusing to register transfer of stock certificates, where evidence established that certificates were no longer valid, having been canceled on books of company, and so transfer was not rightful, and where transferee was not bona fide purchaser, since he had been informed that certificates were not validly issued before he accepted delivery and he had not acquired them for value and in good faith. Folsom v. Security Nat'l Bank, 32 Colo. App. 91, 507 P.2d 1114 (1973).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder such as the assignee, such a restriction is ineffective to support the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. Perugino v. Samson Land & Dev. Co., 39 Pa. D. & C.2d 500 (1965).

Where shares of stock are fully indorsed for transfer, the issuer must register the transfer unless it has knowledge of some unrightfulness of the transfer or some duty to inquire into its rightfulness, such as by notice of another claim. Morrison v. Liberty Disct. & Sav. Bank, 61 Lack. Jur. 37 (Pa. 1960).

8. —Duty to inquire.

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. Kanton v. United States Plastics, Inc., 248 F. Supp. 353 (D.N.J. 1965).

Where shares of stock are fully indorsed for transfer, the issuer must register the transfer unless it has knowledge of some unrightfulness of the transfer or some duty to inquire into its rightfulness, such as by notice of another claim. Morrison v. Liberty Disct. & Sav. Bank, 61 Lack. Jur. 37 (Pa. 1960).

9. Restrictive transfer legend.

In action by broker against issuer of corporate stock arising when issuer refused to transfer certificates because broker's customer had previously obtained transfer of same stock by providing issuer with affidavit stating that shares had been lost, broker did not qualify as bona fide purchaser under UCC § 8-302 and issuer was under no duty to register transfer under UCC § 8-401 where broker had notice of adverse claim under UCC § 8-301 insofar as legend on certificate was sufficient to state claim that transfer was subject to valid restriction and restriction was noted conspicuously on security as required by UCC § 8-204; nor could broker compel registration of transfer under UCC §§ 8-301 or 8-202 since its rights in security were only those which its transferor had. Dean Witter & Co. v. Educational Computer Corp., 369 F. Supp. 757 (E.D. Pa. 1974).

Absent actual knowledge on the part of the assignee of certain stock certificates of an agreement on the part of his assignor to offer the shares represented by the certificates to the other stockholders at a determinable price before selling them to a nonstockholder such as the assignee, such a restriction is ineffective to support the issuer's refusal to transfer the shares and issue new certificates to the assignee unless it is noted conspicuously on the securities themselves. Perugino v. Samson Land & Dev. Co., 39 Pa. D. & C.2d 500 (1965).

10. —Refusal to remove.

Under UCC §§ 8-401 and 8-406, bank, acting as transfer agent for corporation's stock, was not jointly or severally liable with corporation for its refusal on corporation's instructions to remove restrictions from shares belonging to former employee of corporation; bank's refusal to remove restrictive legends from employee's shares did not qualify as refusal to "register a transfer" under terms of § 8-401 so as to subject bank to liability under § 8-406; removal of legend was obvious first step in, and necessary incident to contemplated transfer of stock, but was not equivalent of registration of transfer, and thus, bank retained its common law immunity against suits by injured shareholders; bank, as transfer agent, faced with former employee's request and corporation's order, was not required to determine whether former employee's demotion or discharge entitled him to release of restrictions on his shares and incur thereby full liability should court, after litigation and opportunity for deliberation, rule against bank's decision. Steranko v. Inforex, Inc., 5 Mass. App. Ct. 253, 362 N.E.2d 222 (1977).

Defendant-bank, as transfer agent for bankrupt corporation, was not liable to plaintiff-owners of "legended" investment stock in corporation under UCC §§ 8-401 and 8-406 for wrongful refusal to remove restrictive legends from plaintiffs' shares, resulting in plaintiffs' inability to sell them prior to corporation's bankruptcy; although UCC has abrogated common-law immunity of transfer agents for mere "nonfeasance" (such as failure to act to remove legends) in suits brought by wrongfully injured shareholders, and assuming that plaintiffs' request for removal of legends was substantial equivalent of "request to register transfer" under UCC § 8-401, where restrictive legend expressly required "opinion of counsel" prior to transfer that registration of securities was not required and plaintiffs failed to tender such "opinion of counsel," their requests for transfer were not "rightful" under UCC § 8-401, and consequently bank had no duty to remove legends and issue new unrestricted certificates. Kenler v. Canal Nat'l Bank, 489 F.2d 482 (1st Cir. Me. 1973).

11. Practice and procedure.

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and precluded summary judgment in their favor. DeWitt v. American Stock Transf. Co., 440 F. Supp. 1084 (S.D.N.Y. 1977).

It was proper for trial court to issue temporary mandatory injunction requiring defendant corporation to register in plaintiff's name convertible subordinated notes, issued by defendant, during pendency of litigation which challenged plaintiff's right to own notes on ground that his covenant not to invest or engage in similar business had been breached. Chalfen v. Medical Inv. Corp., 297 Minn. 174, 210 N.W.2d 216 (1973).

12. —Burden of proof.

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. Hollywood Nat'l Bank v. IBM, 38 Cal. App. 3d 607 (2d Dist. 1974).

13. —Damages and costs.

In suit to enforce registration of shares, purchaser may not recover counsel fees and expenses as "loss" resulting from refusal of corporation to register transfer. Rosenberg v. Nathan Benjamin, Inc., 49 Pa. D. & C.2d 188 (1969).

14. —Standing.

Stockholder alleging refusal of management to make timely transfer and reissue of unrestricted stock could not maintain derivative stockholder's action where, under UCC § 8-401, stockholder had individual cause of action for loss resulting from any unreasonable delay in registration or from failure or refusal to register transfer. Reeves v. Transport Data Communications, Inc., 318 A.2d 147 (Del. Ch. 1974).

RESEARCH REFERENCES

ALR. Rights, duties and liability of corporation in connection with stock of infants or incompetents. 3 A.L.R.2d 881.

Rights, duties and liabilities in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock. 22 A.L.R.2d 12.

Necessity of delivery of stock certificate to complete valid gift of stock. 23 A.L.R.2d 1171.

Corporation's knowledge or suspicion of conflicting rights. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 77, 109-117.

18A Am. Jur. 2d, Corporations §§ 98, 245, 280, 343, 484, 501.

18B Am. Jur. 2d, Corporations §§ 1520, 1524.

Duty to register, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:122, 8:123, 8:125.

Duty of issuer to register transfer, 19

Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, §§ 253:2871, 253:2872.

CJS. 18 C.J.S., Corporations § 342.

§ 75-8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) In all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) If the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) If the indorsement is made or the instruction is originated by a fiduciary pursuant to Section 75-8-107(a)(4) or (a)(5), appropriate evidence of appointment or incumbency;

(4) If there is more than one (1) fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) If the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection, assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

(b) An issuer may elect to require reasonable assurance beyond that specified in this section.

(c) In this section:

(1) "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) "Appropriate evidence of appointment or incumbency" means:

(i) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within sixty (60) days before the date of presentation for transfer; or

(ii) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.

SOURCES: Laws, 1996, ch. 468 § 36, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-402 [Codes, 1942, § 41A:8-402; Laws, 1966, ch. 316, § 8-402; 1990, ch. 384, § 38, eff from and after July 1, 1990], pertaining to assurance that indorsements are effective, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-402.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Obligation of good faith, see § 75-1-304.

Liability of issuer for failure or refusal to register transfer, see § 75-8-401.

Limited duty of inquiry, see § 75-8-403.

Liability for registration, see § 75-8-404.

RESEARCH REFERENCES

ALR. Rights, duties and liability of corporation in connection with transfer of stock of infant or incompetent. 3 A.L.R.2d 881.

Rights, duties and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate on ground of knowledge or suspicion of conflicting rights of registered holder or third person. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 68-70, 112, 113.

18A Am. Jur. 2d, Corporations §§ 173, 174, 194-198, 245, 343, 457-460.

18B Am. Jur. 2d, Corporations § 1118.

Guarantee of signature of indorser, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:71.

CJS. 18 C.J.S., Corporations §§ 342, 343.

§ 75-8-403. Demand that issuer not register transfer.

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who initiated the demand at the address provided in the demand and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) The certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) A demand that the issuer not register transfer had previously been received; and

(3) The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in subsection (b)(3) may not exceed thirty (30) days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) File with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.

(e) This section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective.

SOURCES: Laws, 1996, ch. 468 § 37, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-403 [Codes, 1942, § 41A:8-403; Laws, 1966, ch. 316, § 8-403; 1990, ch. 384, § 39, eff from and after July 1, 1990], pertaining to issuer's limited duty of inquiry, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-403.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Obligation of good faith, see § 75-1-304.

Notice of purchaser of adverse claims, see § 75-8-105(d).

Liability for delay or failure or refusal to register transfer, see § 75-8-401.

Assurance that indorsements are effective, see § 75-8-402.

Liability for registration, see § 75-8-404.

Lost, destroyed and stolen securities, see § 75-8-405.

Notice to authenticating trustee, transfer agent, registrar, etc., see § 75-8-406.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-403.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-403.

6. In general.

Had stock warrants been issued in registered form and had they been presented for registration, and had the broker who through mistake had transmitted the warrants for registration filed suit before the registration process was completed, it could prevent the issuer from proceeding. E.F. Hutton & Co. v. Manufacturers Nat'l Bank, 259 F. Supp. 513 (E.D. Mich. 1966).

When the issuer of stock has discharged its duty of inquiry as provided in § 8-403, it then becomes mandatory for it to register the transfer. Kanton v. United States Plastics, Inc., 248 F. Supp. 353 (D.N.J. 1965).

RESEARCH REFERENCES

ALR. Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate, on ground of knowledge or suspicion of conflicting rights of registered holder or third person. 75 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 103-105, 113, 114.

18A Am. Jur. 2d, Corporations §§ 173, 179, 194, 196, 201, 487.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30 ("notice" and "knowledge" of a fact defined).

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:123, 8:125 (duty to register).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, § 253:2881 et seq. (duty of inquiry).

CJS. 18 C.J.S., Corporations § 342.

§ 75-8-404. Wrongful registration.

(a) Except as otherwise provided in Section 75-8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) Pursuant to an ineffective indorsement or instruction;

(2) After a demand that the issuer not register transfer became effective under Section 75-8-403(a) and the issuer did not comply with Section 75-8-403(b);

(3) After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) By an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by Section 75-8-210.

(c) Except as otherwise provided in subsection (a) or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction.

SOURCES: Laws, 1996, ch. 468 § 38, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-404 [Codes, 1942, § 41A:8-404; Laws, 1966, ch. 316, § 8-404; 1990, ch. 384, § 40, eff from and after July 1, 1990], pertaining to liability and nonliability for registration, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-404.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Rights and duties as to registration of securities, see § 75-8-401 et seq.

Assurance that indorsements are effective, see § 75-8-402.

Lost, destroyed and stolen securities, see § 75-8-405.

Notice to authenticating trustee, transfer agent, registrar, etc., see § 75-8-406.

JUDICIAL DECISIONS

I. Under Current Law.
1.-5. [Reserved for future use.]
II. Under Former § 75-8-404.
6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-404.

6. In general.

In action against stock transfer agent for erroneously reissuing, in SEC Rule 144 sale transaction, plaintiff's stock in street name of plaintiff's broker rather than plaintiff's name, where (1) plaintiff, who wished to sell 6,571 shares of unregistered common stock in specified corporation, approached his broker to arrange for such sale pursuant to SEC Rule 144 and signed a "Form 144" and an "assignment separate from certificate," (2) broker without plaintiff's knowledge imprinted its own name in unfilled space for name of assignee of such assignment, (3) broker then mailed plaintiff's stock certificates and "assignment separate from certificate" to defendant transfer agent, together with cover letter requesting that agent reissue new, unlegended certificates in plaintiff's name, (4) transfer agent thereupon reissued single, unlegended certificate in name of plaintiff's broker instead of plaintiff, (5) broker subsequently became bankrupt, and (6) plaintiff failed to recover 1,344 of such shares because of their being commingled with other securities of broker that were held in its street name, court held that under UCC § 8-406, providing that liability of stock transfer agent is same as that of issuer, and UCC § 8-404, providing that issuer is not liable to owner who suffers loss as result of registration of transfer of security if issuer was under no duty to inquire into "adverse claims," defendant transfer agent was not liable for negligence or breach of fiduciary obligation to plaintiff because broker's cover letter to defendant, requesting reissuance of the stock in plaintiff's name, was not an "adverse claim" by the plaintiff or notice of an adverse claim to such stock, and the transfer transaction posed no apparent threat to plaintiff's ownership interest therein. Cohen v. Bankers Trust Co., 445 F. Supp. 794 (S.D.N.Y. 1978).

Where broker purchased 1,000 shares of stock for customer who paid full purchase price therefor, issuer issued ten certificates for 100 shares each in customer's name and delivered certificates to broker, broker using stock powers bearing forged signatures sold shares to bona fide purchaser, forged signatures were guaranteed by bank which had no knowledge of broker's fraudulent conversion of shares and receipt of proceeds of sale thereof, and issuer issued new certificates to bona fide purchaser, (1) issuer was liable to customer under UCC § 8-311 for registering transfer of customer's shares on unauthorized indorsement, and (2) issuer under UCC § 8-404 was required to issue new certificates to customer. SEC v. Albert & Maguire Sec. Co., 560 F.2d 569 (3d Cir. Pa. 1977).

Where plaintiff brought action in Oklahoma for wrongful transfer of stock against corporate issuer organized under law of Rhode Island, plaintiff alleging that her signature had been forged on transfer indorsement of shares and that such signature was guaranteed and shares transferred by defendant's transfer agent: (1) under UCC § 8-102 transfer of stock certificates by transfer agent of issuer was investment security transaction within contemplation of Article 8 of UCC, and under UCC § 8-106 rights and duties of issuer with respect to such transfer were governed by law, including conflicts of laws rules, of jurisdiction of organization of issuer, i.e., Rhode Island; (2) since Rhode Island conflicts of laws rules made Oklahoma statute of limitations applicable and since plaintiff's action to enforce liability of corporation for improper registration of her stock under UCC § 8-311 was not limited by any specific provision of Oklahoma statute of limitations, it was limited by general provision providing five year limitation period for actions not otherwise provided for in statute. Reinhard v. Textron, Inc., 516 P.2d 1325 (Okla. 1973).

Proof of ownership is prerequisite to maintenance of action against corporation for wrongful registration of stock certificate. Lanning v. Poulsbo Rural Tel. Ass'n, 8 Wash. App. 402, 507 P.2d 1218 (1973).

Reasonable notice was given by 94-year-old lady to issuer of stock that stock had been stolen, so that issuer was obligated under UCC § 8-405 to issue new stock certificate to replace that which had been stolen; under applicable law, lady could not elect to take cash in lieu of issuance of her shares of stock under UCC § 8-404. Weller v. AT & T, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Rights, duties, and liability of corporation in connection with transfer of stock of infant or incompetent. 3 A.L.R.2d 881.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 A.L.R.2d 1240.

Duty of corporation to refuse to transfer stock on books to one who presents properly indorsed certificate, on ground of knowledge or suspicion of conflicting rights of registered holder or third person. 25 A.L.R.2d 746.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 77, 82, 86, 106, 114, 116.

18A Am. Jur. 2d, Corporations §§ 171-192, 201, 262, 457, 467, 480-482, 491.

18B Am. Jur. 2d, Corporations § 1118.

Unauthorized indorsement, 6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Forms 8:81-8:57.

CJS. 18 C.J.S., Corporations §§ 346-349.

19 C.J.S., Corporations § 754 et seq.

§ 75-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

(1) So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;

(2) Files with the issuer a sufficient indemnity bond; and

(3) Satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by Section 75-8-210. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

SOURCES: Laws, 1996, ch. 468 § 39, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-405 [Codes, 1942, § 41A:8-405; Laws, 1966, ch. 316, § 8-405; 1990, ch. 384, § 41, eff from and after July 1, 1990], pertaining to lost, destroyed and stolen securities, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The section above is derived from former § 75-8-405. See also § 75-8-406.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Assurance that indorsements are effective, see § 75-8-402.

Issuer's limited duty of inquiry, see § 75-8-403.

Issuer's liability for registration, see § 75-8-404.

Liability for registration, see § 75-8-404.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-405.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-405.

6. In general.

Under the statute, the "issuer shall" provide new securities to replace the lost ones if a "sufficient indemnity bond" is presented and if any other reasonable requirements are met. First Southwest Corp. v. Lampton, 724 So. 2d 988 (Ct. App. 1998).

A court can not order a corporation to issue replacement shares if the stockholder has failed to comply with the statute; the statute is the sole means to pursue replacement. First Southwest Corp. v. Lampton, 724 So. 2d 988 (Ct. App. 1998).

The deposit of stocks into the registry of the court is not a bond within the meaning of the statute. First Southwest Corp. v. Lampton, 724 So. 2d 988 (Ct. App. 1998).

In action seeking replacement from corporations of securities as to which defendants had allegedly improperly registered transfers on forged indorsements: (1) trial court erred in applying provisions of UCC § 8-105, that signatures on securities were "presumed to be genuine or authorized", where evidence was overwhelming that signatures were forged in furtherance of scheme by third parties, who had stolen certificates, to negotiate stock to others; (2) trial court also erred in finding that plaintiffs were "otherwise precluded" under UCC § 8-311, from asserting an effectiveness of transfers where, other than separate finding that plaintiffs were precluded from recovery by unreasonable delay in notifying issuers, record contained no evidence of conduct by the plaintiffs that would preclude recovery; (3) trial court's findings were inadequate on issue whether plaintiffs had notified issuers as to missing securities "within a reasonable time", as required by UCC § 8-405, after they had notice certificates were missing, where, though evidence amply supported court's finding as to date plaintiffs had notice of loss, it did not support further findings that letter sent to defendants some 41 days later was insufficient to notify them of loss, and that more than another month elapsed before adequate notice was given, and where court made no finding as to whether 41-day delay was unreasonable. Ibanez v. Farmers Underwriters Ass'n, 14 Cal. 3d 390, 534 P.2d 1336 (1975).

Judgment creditor who purchased shares of stock at sheriff's sale was not "bona fide purchaser" under UCC § 8-302 since she was not "purchaser" and did not take by "delivery"; therefore, she was not entitled to registration of transfer under UCC § 8-405 where securities had previously been lost and replaced by issuer. Mazer v. Williams Bros. Co., 461 Pa. 587, 337 A.2d 559, 88 A.L.R.3d 942 (1975).

Reasonable notice was given by 94-year-old lady to issuer of stock that stock had been stolen, so that issuer was obligated under UCC § 8-405 to issue new stock certificate to replace that which had been stolen; under applicable law, lady could not elect to take cash in lieu of issuance of her shares of stock under UCC § 8-404. Weller v. AT & T, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Statutory requirements respecting replacement of lost stock certificates as applicable to foreign corporations. 8 A.L.R.2d 1198.

Necessity in prosecution under 18 USCS § 2314 for interstate transportation of securities obtained by fraud that specific securities have moved in interstate commerce. 48 A.L.R. Fed. 570.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 114, 116.

18A Am. Jur. 2d, Corporations §§ 193, 194, 257, 305, 344, 347, 461.

52 Am. Jur. 2d, Lost and Destroyed Instruments § 7 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:141 (lost, destroyed, or stolen certificates).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code § 253:2851 et seq. (investment securities: lost, destroyed, or stolen certificates).

19 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 8 — Investment Securities, § 253:2891 et seq. lost (destroyed, and stolen securities).

CJS. 18 C.J.S., Corporations §§ 240, 241.

§ 75-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under Section 75-8-404 or a claim to a new security certificate under Section 75-8-405.

SOURCES: Laws, 1996, ch. 468 § 40, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-406 [Codes, 1942, § 41A:8-406; Laws, 1966, ch. 316, § 8-406; 1990, ch. 384, § 42, eff from and after July 1, 1990], pertaining to the duty of authenticating trustee, transfer agent or register, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. For present similar provisions, see § 75-8-407.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-406.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-406.

6. In general.

Absence of compliance with notice requirement under UCC Article 9 foreclosure sale would not act as bar to recovery of deficiency judgment but created rebuttable presumption that value of collateral equaled amount of debt and placed on secured party burden of proving that fair market value of goods sold was less than amount of debt. O'Neil v. Mack Trucks, Inc., 533 S.W.2d 832 (Tex. Civ. App. 1975), rev'd, 542 S.W.2d 112 (Tex. 1976), mandate recalled and reissued, 551 S.W.2d 32 (Tex. 1977).

Letter by stockholder's attorney several months after discovery that stock was missing from safe deposit box requesting that stockholder be advised in writing whether issuer showed any change in ownership status of stock did not constitute implied notice as defined under UCC § 1-201(25) that stock had been lost, apparently destroyed or wrongfully taken; thus, stockholder was precluded from taking any action against issuer under UCC § 8-405 when issuer subsequently registered transfer of stock before receiving any such notice that stock had been lost, apparently destroyed or wrongfully taken. Exxon Corp. v. Raetzer, 533 S.W.2d 842 (Tex. Civ. App. 1976), writ ref'd n.r.e., (June 9, 1976).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. Hollywood Nat'l Bank v. IBM, 38 Cal. App. 3d 607 (2d Dist. 1974).

Bona fide purchaser for value of stolen securities endorsed in blank has right to have securities registered in his name when presented to issuer. United States v. Weinberg, 345 F. Supp. 824 (E.D. Pa. 1972), aff'd in part, rev'd on other grounds, 478 F.2d 1351 (3d Cir. Pa. 1973), cert. denied, 414 U.S. 1005, 94 S. Ct. 363, 38 L. Ed. 2d 242 (1973), cert. denied, 414 U.S. 1005, 94 S. Ct. 364, 38 L. Ed. 2d 242 (1973).

Where corporations wrongfully transferred stock upon forged signatures of the plaintiff trustee, in November of 1962, and notice of the illegal transfers reached the plaintiff trustee in July of 1963, § 8-405 of the Uniform Commercial Code would not be applied prospectively to bar the plaintiff trustee's cause of actions against the corporations by estopping her from asserting the ineffectiveness of the forged indorsement. Scovenna v. AT & T Co., 54 Misc. 2d 74 (1967).

§ 75-8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

SOURCES: Laws, 1996, ch. 468 § 41, eff from and after July 1, 1996.

Editor's Note — A former § 75-8-407 [Laws, 1990, ch. 384, § 43, eff from and after July 1, 1990], pertaining to the duties of an issuer as to certificated and uncertificated securities, was repealed by Laws of 1996, ch. 468, § 71, effective from and after June 30, 1996. The provisions of former § 75-8-407 were omitted from Revised Article 8.

For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

Cross References — Effect of signature of authenticating trustee, registrar, or transfer agent, see § 75-8-208.

Effect of guaranteeing signature or indorsement, see § 75-8-306.

Duty of issuer to register transfer, see § 75-8-401.

Assurance that indorsements are effective, see § 75-8-402.

Limited duty of inquiry, see § 75-8-403.

Liability and non-liability for registration, see § 75-8-404.

Lost, destroyed, and stolen securities, see § 75-8-406.

JUDICIAL DECISIONS

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-406.

6. In general.

I. Under Current Law.

1.-5. [Reserved for future use.]

II. Under Former § 75-8-406.

6. In general.

A transfer agent for an issuer of securities has the same obligation to a holder or owner of securities as an issuer. Moore v. Union Planters Corp., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 1063 (N.D. Miss. Jan. 18, 2000).

In action against stock transfer agent for erroneously reissuing, in SEC Rule 144 sale transaction, plaintiff's stock in street name of plaintiff's broker rather than plaintiff's name, where (1) plaintiff, who wished to sell 6,571 shares of unregistered common stock in specified corporation, approached his broker to arrange for such sale pursuant to SEC Rule 144 and signed a "form 144" and an "assignment separate from certificate," (2) broker without plaintiff's knowledge imprinted its own name in unfilled space for name of assignee of such assignment, (3) broker then mailed plaintiff's stock certificates and "assignment separate from certificate" to defendant transfer agent, together with cover letter requesting that agent reissue new, unlegended certificates in plaintiff's name, (4) transfer agent thereupon reissued single, unlegended certificate in name of plaintiff's broker instead of plaintiff, (5) broker subsequently became bankrupt, and (6) plaintiff failed to recover 1,344 of such shares because of their being commingled with other securities of broker that were held in its street name, court held that under UCC § 8-406, providing that liability of stock transfer agent is same as that of issuer, and UCC § 8-404, providing that issuer is not liable to owner who suffers loss as result of registration of transfer of security if issuer was under no duty to inquire into "adverse claims," defendant transfer agent was not liable for negligence or breach of fiduciary obligation to plaintiff because broker's cover letter to defendant, requesting reissuance of the stock in plaintiff's name, was not an "adverse claim" by the plaintiff or notice of an adverse claim to such stock, and the transfer transaction posed no apparent threat to plaintiff's ownership interest therein. Cohen v. Bankers Trust Co., 445 F. Supp. 794 (S.D.N.Y. 1978).

In suit by purchaser of unregistered shares of stock against issuer corporation and issuer's stock-transfer agent for damages for defendants' allegedly wrongful refusal to transfer shares to plaintiff, where certificate representing such shares was unrestricted; shares represented 13 per cent of outstanding shares of issuer corporation and sale thereof might affect control of issuer, which had filed voluntary petition in bankruptcy; corporation other than issuer which owned such stock and sold it to plaintiff had not registered transfer to plaintiff; and issuer's stock-transfer agent had told plaintiff that no transfer would be made because it might violate federal Securities Act of 1933, (1) both case law and Uniform Commercial Code, in UCC § 8-401, recognized mandatory duty of issuer of stock to register transfer thereof, its liability for wrongful refusal to make transfer, and its right to make reasonable inquiry into legality of transfer; (2) under UCC § 8-406, such duty and liability also applied to issuer's stock-transfer agent; and (3) although defendants' refusal to transfer plaintiff's stock may have been reasonable under the circumstances, defendants' conduct presented triable issue of fact and precluded summary judgment in their favor. DeWitt v. American Stock Transf. Co., 440 F. Supp. 1084 (S.D.N.Y. 1977).

Under UCC §§ 8-401 and 8-406, bank, acting as transfer agent for corporation's stock, was not jointly or severally liable with corporation for its refusal on corporation's instructions to remove restrictions from shares belonging to former employee of corporation; bank's refusal to remove restrictive legends from employee's shares did not qualify as refusal to "register a transfer" under terms of § 8-401 so as to subject bank to liability under § 8-406; removal of legend was obvious first step in, and necessary incident to contemplated transfer of stock, but was not equivalent of registration of transfer, and thus, bank retained its common law immunity against suits by injured shareholders; bank, as transfer agent, faced with former employee's request and corporation's order, was not required to determine whether former employee's demotion or discharge entitled him to release of restrictions on his shares and incur thereby full liability should court, after litigation and opportunity for deliberation, rule against bank's decision. Steranko v. Inforex, Inc., 5 Mass. App. Ct. 253, 362 N.E.2d 222 (1977).

In action by bank against issuer, arising out of bank's acceptance of stolen stock certificate as collateral for urgent loan, bank had burden of proving it was bona fide purchaser once it was established that security had been stolen; bank failed to sustain its burden where it made no inquiries as to why stock certificate was in name of brokerage house, paid no attention to fact that "execution guaranteed" stamp was two years old, and, although bank was told that signer of note was acting as agent, it made no attempt to learn name of principal or demand proof of authority. In action against original 1963 registrar on stock certificate, it would have been unreasonable under UCC § 8-406, to hold registrar to perpetual duty to holders or owners of stock, particularly where there was no evidence that defendant was still registrar in 1968. Hollywood Nat'l Bank v. IBM, 38 Cal. App. 3d 607 (2d Dist. 1974).

Defendant-bank, as transfer agent for bankrupt corporation, was not liable to plaintiff-owners of "legended" investment stock in corporation under UCC §§ 8-401 and 8-406 for wrongful refusal to remove restrictive legends from plaintiff's shares, resulting in plaintiffs' inability to sell them prior to corporation's bankruptcy; although UCC has abrogated common-law immunity of transfer agents for mere "nonfeasance" (such as failure to act to remove legends) in suits brought by wrongfully injured shareholders, and assuming that plaintiffs' request for removal of legends was substantial equivalent of "request to register transfer" under UCC § 8-401 where restrictive legend expressly required "opinion of counsel" prior to transfer that registration of securities was not required and plaintiffs failed to tender such "opinion of counsel," their requests for transfer were not "rightful" under UCC § 8-401, and consequently bank had no duty to remove legends and issue new unrestricted certificates. Kenler v. Canal Nat'l Bank, 489 F.2d 482 (1st Cir. Me. 1973).

This section is substantive and does not constitute a conflict of laws rule. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

The proper construction of § 8-406 dictates that the obligations of a transfer agent are the same as that of the issuer, and the net effect of § 8-106 and § 8-406 is to establish that the issuer and any of its transfer agents have equal obligations to security holders, regardless of which state's law is applicable to the case. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

Paragraph (b) should be read in conjunction with paragraph (a), and when this is done, it is apparent that the intent of the entire subsection (1) is to equate the obligation of the transfer agent toward the holder of a security with that of the obligation of the issuer. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

An investment company was not entitled to summary judgment in its action against the issuer of stock and its transfer agent to compel the transfer of stock and for damages for the wrongful refusal to transfer where the investment company's status as a bona fide purchaser without notice was in dispute. Welland Inv. Corp. v. First Nat'l Bank, 81 N.J. Super. 180, 195 A.2d 210 (Ch. Div. 1963).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 77, 109, 110, 115.

18A Am. Jur. 2d, Corporations §§ 179, 180, 184, 198, 245, 343, 502, 503.

18B Am. Jur. 2d, Corporations §§ 1520, 1524, 1525.

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:22 (instruction to jury; effect of unauthorized signature on issue).

6 Am. Jur. Pl & Pr Forms (Rev), Investment Securities, Form 8:122 (duty to register).

CJS. 18 C.J.S., Corporations § 344.

§ 75-8-408. Repealed.

Repealed by Laws, 1996, ch. 468, § 71, eff from and after June 30, 1996. [Laws, 1990, ch. 384, § 44]

Editor's Note — Former § 75-8-408 pertained to the delivery of written statement after registration of transfer of uncertificated security, form and time requirements.

The provisions of former § 75-8-408 were omitted from Revised Article 8. For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

PART 5.

SECURITY ENTITLEMENTS.

SEC.
75-8-501. Securities account; acquisition of security entitlement from securities intermediary.
75-8-502. Assertion of adverse claim against entitlement holder.
75-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.
75-8-504. Duty of securities intermediary to maintain financial asset.
75-8-505. Duty of securities intermediary with respect to payments and distributions.
75-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.
75-8-507. Duty of securities intermediary to comply with entitlement order.
75-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

75-8-509.	Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.
75-8-510.	Rights of purchaser of security entitlement from entitlement holder.
75-8-511.	Priority among security interests and entitlement holders.

§ 75-8-501. Securities account; acquisition of security entitlement from securities intermediary.

(a) "Securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e), a person acquires a security entitlement if a securities intermediary:

(1) Indicates by book entry that a financial asset has been credited to the person's securities account;

(2) Receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) Becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement.

SOURCES: Laws, 1996, ch. 468, § 42, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-502. Assertion of adverse claim against entitlement holder.

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement under Section 75-8-501 for value and without notice of the adverse claim.

SOURCES: Laws, 1996, ch. 468, § 43, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in Section 75-8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under Sections 75-8-505 through 75-8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against a purchaser of the financial asset or interest therein only if:

(1) Insolvency proceedings have been initiated by or against the securities intermediary;

(2) The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) The securities intermediary violated its obligations under Section 75-8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) The purchaser is not protected under subsection (e).

The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a), whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under Section 75-8-504.

SOURCES: Laws, 1996, ch. 468, § 44, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-504. Duty of securities intermediary to maintain financial asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

SOURCES: Laws, 1996, ch. 468, § 45, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-505. Duty of securities intermediary with respect to payments and distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

SOURCES: Laws, 1996, ch. 468, § 46, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 47, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-507. Duty of securities intermediary to comply with entitlement order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

SOURCES: Laws, 1996, ch. 468, § 48, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

SOURCES: Laws, 1996, ch. 468, § 49, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-509. Specification of duties of securities intermediary by other statute or regulation; manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.

(a) If the substance of a duty imposed upon a securities intermediary by Sections 75-8-504 through 75-8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by Sections 75-8-504 through 75-8-508 is subject to:

(1) Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) Rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Sections 75-8-504 through 75-8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

SOURCES: Laws, 1996, ch. 468, § 50, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

§ 75-8-510. Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c), an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under Section 75-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Chapter 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as otherwise provided in subsection (d), purchasers who have control rank according to priority in time of:

(1) The purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under Section 75-8-106(d)(1);

(2) The securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under Section 75-8-106(d)(2); or

(3) If the purchaser obtained control through another person under Section 75-8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

SOURCES: Laws, 1996, ch. 468, § 51; Laws, 2001, ch. 495, § 22, eff from and after Jan. 1, 2002.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 117, 118.

§ 75-8-511. Priority among security interests and entitlement holders.

(a) Except as otherwise provided in subsections (b) and (c), if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

SOURCES: Laws, 1996, ch. 468, § 52, eff from and after July 1, 1996.

Editor's Note — For disposition of sections of former Article 8 in Revised Article 8, see Editor's Note preceding § 75-8-101.

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